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JAMES. H. McKENNEY
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No. 10,469.

IN THE

Circuit Court of the United States,

NINTH CIRCUIT,

Northern District of California,

IN THE

Matter of DAVID NEAGLE

UPON HABEAS CORPUS.

ORAL ARGUMENT

OF

JOHN T. CARRY, United States Attorney,

ON BEHALF OF PETITIONER.

ARGUMENT.

United States Attorney Carey:—

If it may please the Court, I approach the discussion of this subject with a due appreciation of the delicacy with which Federal and State Courts will consider the matter of seeming encroachments by one upon the other's jurisdiction. If there has been a tendency to disregard the lines of jurisdiction, if there has been a disposition to encroach upon the jurisdiction of the other, a review of the judicial history of this country will not furnish instances chargeable to the Federal Courts, but marked and persistent assumptions of State Courts will be found abundant to put to silence the most apprehensive and alert State rights advocate, and to charge the State tribunals with most flagrant attempts to interfere in matters foreign to their jurisdiction. The State Courts, during the late Civil War, the most perilous times that we have experienced in a hundred and more years of our national existence, persisted, in the face of an Act of Congress conferring exclusive jurisdiction upon the Secretary of War to pass upon such matters, to issue writs of habeas corpus to liberate minors who had enlisted in the army. The State Courts, under the fugitive slave laws, assumed jurisdiction to punish, as for contempt, United States Marshals for executing those laws and resisting their process, calculated and intended to nullify the Acts of Congress. It is highly proper and important to keep, at all times, steadily in view the boundary lines of the jurisdiction of each, and, for both National and State Courts to deal with these questions with delicacy and a scrupulous regard for that comity conducive to the harmony of the Federal and State system of jurisprudence. It is not with any apprehension as to whether the petitioner in this case would be fully justified and acquitted of all blame in

the premises by the State Courts that has induced us to invoke the Federal Jurisdiction, but because—as I read the law and consider the fitness of things,—it is his right to have his official conduct in the matter in hand passed upon by the Courts of that Sovereign whose servant he was, and at whose behest and directions he assumed the discharge of the responsible duties imposed upon him. For any dereliction of duty he was accountable alone to that Sovereign whose agent and servant he was. For any excess of authority exercised by him, if he stepped beyond the pale of his duty, his Sovereign was no longer his protector, but for every act he did within the line of his duty he is entitled to its protection, and it should exert its every arm of power to protect and shield him from every consequence incident to his every act. The United States Government, through its constituted authorities, commissioned the petitioner a Deputy United States Marshal, assigned him to duty with instructions as to what he was required to do. That Government, through its judiciary, has the right now to inquire and make answer upon inquiry to the people of the State of California as to whether the petitioner kept within the line of his duty, kept within the limits of his authority, and if it is determined that he did, to assume the responsibility of his acts and make them its own by justifying him and protecting him from prosecution. And on the other hand, to repudiate his acts and remand him to the State Courts to answer, if it is determined that he exceeded his authority or that the acts done by him were not justifiable. The State Attorney-General contends that the Federal Courts have no jurisdiction over the offense with which the petitioner stands charged, and, therefore, it is an usurpation of jurisdiction to proceed further, after being informed that the offense is one against the peace and

dignity of the People of the State of California and one triable alone in the State Courts, and that the process under which he is held is regular upon its face. But this proposition evades the whole question. Conceding that if an offense was committed by the petitioner (which we do not by any means), then the contention on our part is that it was an act done under the laws of the United States, and whether such act constitutes an offense or not, if Section 753 of the Revised Statutes of the United States is constitutional, being the supreme law of the land, this Court has jurisdiction to hear and determine whether such act was justified under all the circumstances of the case.

It is not contended on the part of the petitioner in any event that this Court has any jurisdiction whatever to try the crime of murder committed at the town of Lathrop, in the County of San Joaquin, State of California, or committed at any place within the territorial jurisdiction of the State of California, which place had not theretofore been ceded to and was under the jurisdiction of the United States. That is not the question here. The question presented here is, that even though the petitioner may have come in conflict with the laws of the State, and it may have become necessary for him to violate the law of the State, was the act which he did one that he was required to do in the discharge of his duties under the laws of the United States? It is conceded that if the charge against the prisoner is to be *tried,* that the trial must be had in the State Courts. The inquiry on hand is, shall the petitioner be tried?—and this depends upon the solution of a question over which this Court, by express provision of the statute, has jurisdiction. Was the act done by the petitioner an act he was authorized or required to do under the laws of the United States, and was he justified in doing the act as he did

do it? The proposition contended for by the counsel for the State is, that the sovereign which commissioned this petitioner to perform certain duties under its laws is not competent, is prohibited from inquiring into his official conduct in the discharge of the duties devolved upon him by reason of that commission. The petitioner being an officer, the servant of the Federal Government, is amenable alone to its jurisdiction; he is answerable alone to that Government for his official conduct, and if he kept within the line of his duty his acts become the acts of that Government, and he is responsible alone to that sovereign for the manner in which he discharged his duties under it. If the Federal Government justifies the act of the petitioner, then it becomes the act of that Government. But who is to determine that question? It is for the Federal Court to say whether it was an act done under the laws of the United States. It is for these Courts to say whether the acts done were done under a law of the United States, or, in other words, whether it was a governmental act, the act of the sovereign done in pursuance of its laws.

I do not propose to take up the time that I shall consume in presenting my views of this case in replying to suggestions made by the counsel who just preceded me. I shall leave that to my associate, Mr. Wilson. Still, there were some suggestions made that I may refer to as I proceed with my argument. It is said that we have not pointed the Court to any act of Congress under which the petitioner in this case acted when he took the life of the deceased, David S. Terry, and that we must bring ourselves literally within the provision of the Habeas Corpus Act by putting our finger on a *statute* which in terms directed him to take the life of David S. Terry, or else this writ will not obtain. This proposition goes to the length that there

are no laws of the United States other than the specific acts of Congress. It ignores implications growing out of express enactments and inherent principles that obtain in the nature of things as incident to National existence. It must be conceded that the Constitution and laws of the United States and the treaties made thereunder are the supreme law of the land. They are supreme, and obtain in their supremacy on every foot of American soil. To this proposition the States of the Union and the people thereof have given their solemn assent and promised submission by subdivision 2 of Article VI of the Federal Constitution, and pledged their faith that the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. It is provided in Section 753, Revised Statutes of the United States, that this Court has jurisdiction to issue the writ of habeas corpus where a person is confined or imprisoned in a State jail, or deprived of his liberty by an act done or omitted to be done under the laws of the United States. It is the right of the citizen to have the cause of his detention inquired into by the Federal Courts when that detention is for an act done under the laws of the United States. This is the supreme law of the land, and California has given her solemn assent to render herself and her jurisdiction subservient to the Federal Courts in such a case, and has pledged her faith that her Judges shall be bound by this law, anything in her constitution or laws to the contrary notwithstanding. Nor does it matter whether the act done under the laws of the United States, and for which the petitioner may stand committed, is an offense against the State law. The jurisdiction still obtains. The history of this clause of the Habeas Corpus Act shows that it found its way into the statute to meet just such

an exigency as exists in this case. It occurred in the history of this Union that State laws made it an offense to enforce or to attempt to enforce certain acts of Congress within the territorial limits of the State. Attempted nullification by South Carolina is familiar to every citizen in the land. Had this pernicious doctrine obtained, it would have proven more effectual to dismember the Union than twenty civil wars of the rebellion. It would have proven more fatal to the life of the Nation than an acknowledged right of secession. Every recurring session of Congress would have given new and multiplied causes for opposing legislation by the States, constant conflict of Federal and State authorities would have occurred and the identity of the Federal Government soon lost in the confusion incident to the caprice of each particular State. To meet the emergency and the attempt at grafting such a doctrine upon our institutions and avoid an untimely end of them, the very clause in the Habeas Corpus Act under which this writ was issued was passed by Congress, giving the Federal Courts jurisdiction to inquire into the cause of imprisonment of persons and officers of the Federal Government who were arrested and charged with offenses against the State law who in executing the laws of Congress found it necessary to violate a law of the State.

See Act of Congress, approved March 2, 1883, Vol. 4, Statutes at Large, U. S., page 634.

This was known in the times of its enactment as the "Force Bill." It occurs to me that the most sanguine States right citizen who has any love and hope for our institutions and loyalty to the National Government congratulates himself and the country upon the adoption of that statute by Congress and its successful enforcement. An attempted invasion by the States

upon any Constitutional rights exercised by the Federal Government is fraught with more disastrous results than would be an attempted invasion upon a State right, for the one would concern the whole country, the whole people, while the other might only effect the immediate interests of the particular State and the people of that State. Whatever may have been thought or said of this contest at the time it occurred, the time has long since passed when it could be contended with any degree of plausibility in this or any other Court that it is an attempted usurpation of authority for the Federal Courts to take jurisdiction to inquire into the cause of imprisonment of a person in State custody for an act done under the laws of the United States. The States and the people of the States have said that the Constitution and laws of the United States and the treaties made thereunder are the supreme laws of the land. That is, that when State laws conflict with either the Constitution of the United States, a law of Congress or a treaty made in pursuance thereof, that the State law must give way, and is null and void. Then unless Section 753 of the Revised Statutes of the United States is void under the Federal Constitution it is in force in every State of this Union by the express consent thereof to the exclusion of any State law to the contrary. There can be no usurpation of right or jurisdiction when the right of jurisdiction is conceded to exist. But the clause of Section 753 of the Revised Statutes of the United States upon which the jurisdiction in this case rests has long since been settled to be in full harmony with the Constitution of the United States.

Then, if under the provisions of this section, the act, the killing of David S. Terry by the petitioner, was done under the laws of the United States, although it is an act for which he could be prosecuted alone in the

State Courts, this Court has jurisdiction to inquire and determine whether he should be subjected to that prosecution or was justified and entitled to be discharged from custody. Jurisdiction to issue the writ, necessarily implies jurisdiction to hear and determine, and the latter necessarily involves the jurisdiction to discharge.

But it will be contended that the offense charged against the petitioner is not an offense against the laws of the United States, and that therefore the Federal Courts do not have jurisdiction to try the cause. That it is an offense against the laws of the State, and that the State Courts alone have jurisdiction to try the same. That the State Courts alone can pass upon the question of justification. But the Habeas Corpus Act, or Section 753 of the Revised Statutes of the United States, covers other cases than where the act was done in executing a law of the United States, the enforcement of which is prohibited by State law, and includes persons restrained of their liberty by the State authorities for an offense committed against the general law of the State, and applies to all persons equally when it appears that they were justified for the act done, because it was done in pursuance of the law of the United States. United States *ex rel. Roberts* vs. *Jailer of Fayette County*, 2 Abb. U. S., 276.

The pertinent facts in the case just cited are as follows: A warrant in due form and in due course of proceedings had been issued by a United States Commissioner commanding the arrest of one Joshua J. Cull, charging him with certain crimes against the internal revenue laws of the United States. Cull had heard that a warrant was out for him and several attempts had been made by Deputy United States Marshals to arrest him, but he had for some time succeeded in

evading them. Afterwards the Marshal "appointed one A. W. Fogle, special bailiff, and placed the warrant in his hands for execution, informing him at the same time of the necessity of observing secrecy as the accused was endeavoring to evade arrest, and enjoined him to take with him assistance, as the accused, if found, would resist arrest." Fogle took Roberts with him to assist in making the arrest. They proceeded to the residence of Cull, arriving there about 11 o'clock at night. Fogle went to the front door and sent Roberts to the rear door. Fogle knocked several times and finally received a response from Cull, asking what was wanted. Fogle replied that he wanted to see him, that he was an officer and must see him. Cull broke out of the back door, and meeting Roberts, began to shoot. Roberts retreating, ordered him not to shoot. Cull persisting in shooting, Fogle ran around to the assistance of Roberts and found Roberts retreating and crying to Cull: "Don't shoot!" "Don't shoot!" Cull fired twice after the arrival of Fogle, and Roberts then fired and killed Cull. Roberts was arrested by the State authorities for murder, and proceedings were being had looking to his indictment. A writ of habeas corpus was sued out of the United States Circuit Court, Sixth Circuit of Kentucky, under the same clause of the Habeas Corpus Act under which the petitioner in this case seeks inquiry to be made into the cause of his imprisonment.

Counsel for the State "insisted that under the true construction of the Act of March 2, 1833, the Federal Court can, under a writ of habeas corpus, relieve a party *only where it appears* that he is in custody under a State law which expressly seeks to punish him for doing what a law or process of the United States requires him to do. That here the State law does not make it criminal to execute the process of the United States or to enforce their revenue laws, but simply

seeks *to punish murder no matter by whom committed;* that the killing was done in this State; that the offense can be inquired of only in the State tribunals, that this (the Federal) Court has no jurisdiction to try the accused, that under the construction of the facts most favorable to the relator he acted in self-defense, but that this is a matter which this (the Federal) Court cannot pass upon and which cannot be lawfully passed upon except by a jury of the vicinage."

Counsel for the State in the case at bar takes the same position in every particular that was taken in the Roberts case just quoted from.

Judge Ballard, in passing upon the case cited, observes: "By a long course of judicial decisions it may now be considered as settled that this Act (Habeas Corpus Act) gives relief to one in State custody not only when he is held under a law of the State which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the State, which applies to all persons equally where it appears he is *justified* for the act done because it was done in pursuance of a law of the United States or of a process of a Court or Judge of the same. *Ex parte Jenkins* before Mr. Justice Grier, 2 Wall., C. C., 521. *Ex parte Jenkins* before Judge Kane, Id., 539. United States *ex rel. Garland* vs. *Morris*, 2 Am. Law Reg., 348. *Ex parte Robinson* before Justice McLean, 6 McLean, 355. *Ex parte Marshal*, 5 McLean, 659. *Ex parte Trotter*, decided by this Court in 1862. The decisions in the Courts of the United States are absolutely uniform on this subject," &c. Judge Ballard after reciting the facts in the Jenkins case, which came up three different times in different phases, but based upon the same facts each time, and in which Jenkins was once discharged by Justice Grier and twice by Judge Kane, says: "I think it impossible to distinguish in principle these cases from the one now before me. If Mr. Justice Grier and Judge Kane had jurisdiction of the cases severally

before them, surely I have jurisdiction in the present case. If Roberts was not in terms directed by process under which he acted to kill Cull, neither was Jenkins directed by his warrant to beat or wound Thomas. If Roberts was in State custody under a warrant issued by a State Judge for an alleged offense against the State laws, so was Jenkins when he was discharged by Judge Grier," etc. * * * * * "I disclaim all right and power to discharge the relator on any such ground as that the proof shows he acted in *self-defense*."

"A Jury would probably acquit him on such ground independent of the process under which he acted, but I have nothing to do with such an inquiry. It belongs only to the State Courts. I have only to inquire whether what he did was done in pursuance of a law and process of the United States and so *justified*, not excused by that law and process."

The Judge then, after quoting from several authors on criminal law to sustain the doctrine that if officers in the legal exercise of a particular duty kill a person who resists them or prevents them that they are justified, reviewed the facts of the case under consideration and discharged Roberts from custody.

In addition to the cases cited in the opinion delivered by Judge Ballard in the Roberts case, to sustain the jurisdiction of the Court, I will, without taking up the time to read from other cases, refer the Court to the following :

Ex parte Thompson, 1 Flippin, 510.
Ex parte Robinson, 1 Bond, 39.
In re Bull, 4 Dillon, 323, 329.
In re Neil, 8 Blatch., 156.

This brings us to the inquiry whether from the facts proved it appears that Neagle is restrained of his liberty by the State authorities for an act done by him under the laws of the United States. Whether Neagle was

acting under a law of the United States, whether he was in the line of the discharge of a duty imposed upon him by the laws of the United States and whether in the discharge of that duty he was justified in doing the acts done by him. If these inquiries are answered affirmatively he is entitled to his discharge and the case will have been brought fully within the express letter of the law conferring jurisdiction upon this Court to inquire into the cause of his imprisonment The evidence shows that Justice Stephen J. Field is now, and for more than a quarter of a century has been, an Associate Justice of the Supreme Court of the United States. That as such he has at all times been allotted to preside at the session of the United States Circuit Court for the Ninth Circuit, which includes the States of Oregon, Nevada and California. That as such presiding Justice he held a session of the Ninth Circuit Court at the City and County of San Francisco, State and Northern District of California, on the 3rd of September, 1888. That at the session of said Court, held on the date last mentioned, he rendered a decision of said Circuit Court in the cases of *Frederick W. Sharon*, executor of William Sharon, deceased, vs. *David S. Terry and Sarah Althea Terry*, his wife, and *Francis G. Newlands*, as trustee, and others vs. *David S. Terry and Sarah Althea Terry*, his wife.

That while reading the decision of the Court in said cause, David S. Terry and his wife committed a gross contempt of Court by the wife using most offensive and indecent language toward said Justice while he was in the act of reading said opinion, and by said David S. Terry assaulting the U. S. Marshal in the presence of the Court, and resisting the execution of an order of the Court, all on account of what the Court was about to decide effecting the interests of Terry and wife. That they were both summarily punished for

this contempt, the wife having been sentenced to thirty days and the said David S. Terry to six months in the County Jail of Alameda County. That for and on account of this decision and the conviction and punishment for said contempt, David S. Terry and wife both threatened vengeance upon the life of Justice Field, and threatened to kill him the first time they met him. Threatened at times to insult him the first time they met him, and if he resented, to kill him, and other times that he should not leave the State alive. That David S Terry was a man of desperate character, determined of purpose, not given to idle boasting nor idle talk. That he was in the habit of carrying a bowie knife of the most improved pattern, that these threats were not made once nor to but one person but many and frequent times and to divers persons. That time did not abate his anger nor his disposition toward Justice Field, but evidenced the fact that he nursed and doted on his supposed wrongs and ripened, what at first might have been an impulse, into a fixed resolution to insult, degrade and kill this eminent member of the highest Court known to our institutions. That these threats and this purpose was known to the general public and had excited the fears of his friends, the public and the Federal authorities in this State and at Washington, lest they should be put into execution. Terry and wife had been released from jail; Justice Field was about to take his annual trip from Washington City to this State in the discharge of his official duties. The Attorney-General of the United States, alarmed and apprehensive for the safety of Justice Field, and fearing personal violence to this Justice, directed the United States Marshal for this district to use every precaution to protect the life of this venerable member of the United States Supreme Court against any attempted violence or assaults upon

his person by the Terrys. The correspondence in evidence between the Attorney-General, the Marshal and the United States Attorney all show that it was believed that the strong arm of the Government was needed to protect the life and the personal independence of this eminent jurist in the discharge of his official duties and that if it was not afforded he would be killed. The business we now have on hand demonstrates that these were not unfounded imaginings nor wild surmises, but based upon sound judgment, that dictated discretion and caution. The Marshal was directed by the chief officer of the Department of Justice to use every precaution to protect Justice Field against personal violence and insult at the hands of the Terrys, and authorized the Marshal to appoint Deputy Marshals enough to enable him to follow these instructions and to conduct the ordinary business of his office. Justice Field arrived on this coast and in this city in the latter part of June for the purpose of holding, and did hold, several sessions of this Court. Pursuant to instructions and the authority received from the Attorney-General the Marshal increased his force of Deputies, and, among others, appointed the petitioner a Deputy United States Marshal in due form, and assigned him to the duty of accompanying Justice Field about his Circuit with instructions to protect him from personal violence at the hands of the Terrys. The petitioner duly qualified and entered upon the discharge of his duties and how faithfully he has performed that duty the presence of Justice Field as a spectator to the proceedings taking place here to-day, whose shield and protector he was, with mute eloquence far surpassing power of speech, answers; and the silent resting place of David S. Terry refrains, "I have received my just deserts." I have not gone into a detailed statement of the facts

because your Honors have heard the evidence. I have only stated sufficient, in a general way, to point the proposition: Was Neagle acting under the laws of the United States?

The Department of Justice is established by Act of Congress and the head of this Department is the Attorney-General. (Section 346, Revised Statutes of the United States.)

This Department is but an arm of the executive branch of the Government. It is under the direction and control of the Chief Executive of the Nation. The orders and directions of the Attorney-General are but the orders and directions of the President. By section 362 of the Revised Statutes of the United States the Attorney-General has the general supervisory control and direction of the United States Marshals and District Attorneys throughout the Union in the discharge of their duties. It is under the authority of this Section that the Attorney-General gave the instructions he did to Marshal Franks and authorized him to incur the expense of additional Deputies. The Marshals are authorized by express provision of Statute to appoint Deputies. I refer to Section 780, Revised Statutes, United States. Then I maintain:

First. That Neagle was acting under an executive order of the President of the United States, authorized and enjoined by the Constitution of the United States.

Second. He was acting under the laws of the United States, imposing upon and defining his duties as a Deputy United States Marshal. I shall now present my views as to the first answer and then follow with my views as to the second.

The Attorney-General of the United States, as the head of the Department of Justice, which department is

established as an arm of the Executive Department of the Government, instructed and directed the Marshal to take all needful and necessary precautions to protect Justice Field and the Federal Judges in the discharge of their official duties against assaults and personal violence at the hands of the Terrys. Section 362, R. S. U. S., gives the Attorney-General supervision and control over United States Marshals and United States District Attorneys in the discharge of their several duties. This, of course, covers the control of these officers in the discharge of *every duty* growing out of their official positions. Duties implied and incident to the office as well as those expressly declared by statute. For instance, it is made the duty of the Marshal to attend upon the Federal Courts of their district by the express letter of the law, but it does not state what for, nor what they shall do while in attendance upon these Courts, but the implied duty of opening and closing Court, keeping order and decorum in the Court-room and in chambers where proceedings may be had, and policing the Court is as certainly a part of their duty as the act of attending. The mere attendance, without duties and powers in the premises, would be an idle injunction. In these matters all must agree that the Attorney-General has power and authority to direct and control the official acts of the Marshals. But does the duty of the Marshal stop within the walls bounding the Court room or the chambers of the Judges? We urge that one of the principal duties devolved upon the Marshal is to protect the Judges in the discharge of their official duties wherever their official duties call them. Courts are created and organized, and Judges appointed, and other officers of the Department of Justice, for the administration of the law, and every power, authority and protection necessary to that end must be implied

from the very nature of things. But if this section of the Revised Statutes is not sufficient to authorize the Attorney-General to direct that protection shall be afforded the Judges whenever necessity requires, then we suggest that the authority comes from a higher source through the same instrumentality, and can be sustained on a law of necessity that obtains as well in Governments as it does to individual life, the law of self protection or self preservation.

Mr Yeamans, in his study of Governments, observes: "Among the duties of a State, inculcated by the most eminent publicists, as well as prescribed by the ends of its institution and existence, *is that of its own preservation.* * * * Vattel maintains that every nation is bound *to preserve itself*—that the compact of government can be regularly dissolved only by common consent, that it is morally impossible to obtain such consent without a necessity; and that it is *in the nature of sovereignty that citizens cannot be suffered to oppose the supreme authority whenever they think its commands are unjust or prejudicial*, giving as the true and sufficient reason for this that such license would be returning to a state of nature, and would make all government impossible." (Chap. VIII, p. 1.)

Justice Johnson observed, in the case of *Martin* vs. *Hunter*, 3 Pet., 361, that "the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers."

Chief Justice Marshall observed in the case of *Osborn* vs. *The Bank of the United States*, 9 Wheat., 738: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for instance, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that *he shall not be punished for obeying this order.* This security is implied in the order itself. It is no unusual thing for an Act of Congress to imply without expressing this

very exemption from State control. * * * The collectors of the revenue, the carriers of the mail, the mint establishment *and all those institutions which are public in their nature* are examples in point. It has never been doubted that all who are employed in them *are protected while in the line of their duty* and yet *this protection is not expressed in any Act of Congress.* It is incidental to and is implied in the several Acts by which those institutions are created, and is secured to the individuals employed in them by the judicial power alone, that is, the judicial power is the instrument employed by the Government in administering this security."

But can it be said that every department of the Government and the employees therein are entitled to this protection and to secure such protection through the judicial power, and yet there is no protection to be thrown about it or its officers in the line of their duty? We think not. The executive department, the President of the United States, we shall attempt to show, is bound to preserve the Union, protect the Constitution and every department and officer of the Government in executing the laws of the United States and performing the duties devolving upon such officers. The President of the United States takes upon himself the solemn obligation to preserve, protect and defend the Constitution of the United States: Federal Constitution, Art. II, Sec. 1, Sub. 9, and also "To take care that the laws be faithfully executed," Art. II, Sec. 3, Sub. 1. Every power in the Government, civil and military, was given him in charge to use as necessity might require to enforce the laws of the United States. Since his only means of enforcing these laws is through the agency of officers appointed for that purpose, of necessity he must have the power and authority to protect them while in the line of their several duties.

The instruction given to the Marshal by the Attorney-General in the case at bar was but an executive order affording protection to Justice Field in the discharge of his duties and enforcing the law that made it his duty to hold sessions of the Circuit Court in this Circuit, and while no express provision of statute extending this protection can be found it is a protection to be afforded by the President by implication growing out of the injunction to enforce the laws. All the powers necessary to protect and defend the Constitution, maintain the Government and enforce the laws thereof not expressed, are incidental to and implied by the constitutional duties imposed upon the President. These ends can only be accomplished through the instrumentality of agents or officers of the Government, and that they may perform their several duties under the law, if protection be necessary, by implied authority, the President must afford them protection while in the discharge of their several duties. The injunction is "to take care that the law be faithfully executed." Not that he shall perform the duties of any particular officer who may be derelict of duty or hindered by force from performing his duty, but that he shall see to it that such officer performs the duties devolved upon him.

It was suggested by counsel that if the President of the United States in the course of his executive duties had authority to direct an officer of the Government to execute the laws, that he had no authority to direct the petitioner to take the life of a human being. There is nothing in the case disclosed either in the petition, traverse, or evidence submitted to the Court, whereby we contend that the Attorney-General, or any one else, directed the petitioner in this case to take the life of David S. Terry or any one else, or to commit murder,

or any other crime; but on the contrary he was directed by the President of the United States under the constitutional obligation resting on him to execute the laws of the United States, to protect and shield one of the highest Judicial officers of this Government If in executing that order and direction it became necessary to take life, that power and authority was not only impliedly given to him but he was required to exercise it at his peril. His instructions were not to take life, but to protect life, and if it became necessary to take life, in order to protect the life of the Associate Justice, then under the authority of one of the first cases that came up in this country in the Federal Courts, involving the jurisdiction of these Courts to inquire by habeas corpus into the acts of a United States Marshal who, in enforcing the process of the Court had to take life, it was held that the jurisdiction obtained and that running with the order of the Court that the Marshal was directed to execute was the implied authority to take life if necessary, and if the killing was necessary or justifiable the killing became and was an act done under the laws of the United States, and the petitioner entitled to his discharge. That was a case where a United States Marshal held a process from the Federal Court for the arrest of a party which was placed in his hands to execute, and in executing it it became necessary to kill the party sought to be arrested. While the process did not direct that he should take the life of the person to be arrested, the Court held, that the implied authority running with the process itself, authorized the officer to use all necessary means and force to serve it, and make the arrest, and that the implied authority to kill if it became necessary ran with the process. *United States* vs. *Jailer, supra.* So that in this case, while the petitioner was not directed to take the life of David S.

Terry, or any one else, he was directed to protect and shield Justice Field against assaults and violence at the hands of David S. Terry and his wife, and it became necessary, in order to execute that direction, for him to take the life of either, the implied authority was to be found in the very duty imposed upon him. The Marshal was not directed to appoint the petitioner, but was directed to use all necessary means and caution to prevent violence being done to the person of Justice Field at the hands of Terry and his wife. That the petitioner was a Deputy United States Marshal, is not gainsaid. It is suggested that the Marshal exceeded his authority when he *appointed* the petitioner to accompany Justice Field to Los Angeles and upon his return as his deputy. He was not appointed to go to Los Angeles. He was duly appointed a Deputy United States Marshal for the Northern District of California, and detailed for this mission. I do not know where counsel has obtained his idea that the petitioner was appointed to go to Los Angeles. It appears that the petitioner was within his bailiwick, the Northern District of California, when the act complained of was committed by him, so that there is nothing in the point suggested by counsel, that the Marshal appointed the petitioner to act in another District. That he was instructed by his superior officer to do the things he did do, there can be no question. That he acted upon the instructions of his immediate superior officer there can be no question, because his superior officer confirms his own testimony as to these matters. So that it comes back to the proposition, whether or not the President of the United States, through the Department of Justice, which, as I have said before, is an arm of the Executive branch of the Government, had the constitutional and legal power to authorize and direct the Marshal to

protect the life of Justice Field and the Federal Judges of this Circuit in the discharge of their official duties. I shall not consume the time of the Court in referring to the specific constitutional provisions bearing on this question, because they were read by Judge Mesick yesterday. But it must be a self-evident proposition —it must be a law of necessity that obtains in every Government, that the power exists with the Executive of that Government to preserve and enforce its laws, protect its officers, and defend the Government. To say that no protection can be given by a Government that has imposed obligations and duties on its officers or citizens who have assumed office under it, and who have been commissioned to discharge particular duties of trust, when in the line of the discharge of those duties, is to say at once that the Government has not the power of self-preservation. In passing upon these questions I wish to read from some of the opinions expressed by some of the Justices of the Supreme Court, which may have a bearing upon the power that exists in the Federal Government for the purpose of self-protection, and which also have an indirect bearing on the authority of the President of the United States. The power of self-protection incident to the Government must be lodged somewhere, and it must be executed through the agency of its officers. The Executive is the supreme or chief power.

Justice Johnson, of the Supreme Court of the United States, in the case of *Martin* vs. *Hunter*, 3 Wheaton, page 361, in passing on the question of conflict of jurisdiction of the States, incidentally comments upon the power of the Government to protect itself, and says: "I have another reason for expressing my opinion on this occasion: I view this question as one of the most momentous importance; as one which may affect,

in its consequences, the permanence of the American Union. It presents an instance of collision between the judicial powers of the Union and one of the greatest States in the Union, on a point the most delicate and difficult to be adjusted. On the one hand the *general government must cease to exist, whenever it loses the power of protecting itself in the exercise of its constitutional powers.* Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our Constitution, except as far as it shall be sanctioned by the latter; but let the latter be obstructed in its progress, by an opposition which it can not overcome or put by, and the resort must be to the former or government is no more."

In the case of *Tennessee* vs. *Davis*, 100 U. S. Rep., 262, in discussing the power of Congress to provide for the removal of criminal prosecutions, the Court in commenting upon the power of the Government to protect its officers, said:

"A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in *Martin* vs. *Hunter* (1 Wheat., 361), 'the general government must cease to exist, whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting and within the scope of their authority, those officers can be arrested and brought to trial in a State Court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the State Court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done

under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State Court, the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested."

Judge Mesick yesterday illustrated how the entire machinery of this Government could be suspended by the arrest of the President of the United States charged with a crime against the law of some State:

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

"By the last clause of the eighth section of the first article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Among these is the judicial power of the goverment. That is declared by the second section of the third article to 'extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made or which shall be made under their authority,' etc. This provision embraces alike civil and criminal cases arising under the Constitution and laws. *Cohens*

vs. *Virginia*, 6 Wheat., 264. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be as fully exerted over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into Court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sec. 1647; 6 Wheat., 379. It was said in *Osborne* vs. *The Bank of the United States* (9 Wheat., 738), 'when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.' And a case arises under the laws of the United States, when it arises out of the implication of the law. Mr. Chief Justice Marshall said, in the case last cited: 'It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control.' * * * 'The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are

examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone: that is, the judicial power is the instrument employed by the government in administering this security.'"

So that we say here in this case there is the implied power of protection to every officer in every department of the Government in the discharge of the duties devolved upon them by the laws of the United States. That when the laws of the United States required Justice Field to travel from one side of this Continent to the other in the discharge of his official duties that it vouchsafed to him that he should be afforded all necessary protection to enable him to discharge that duty. Supposing it was at a time before the early settlement of the country when the savages frequently were on the war path and dealing out death to all whites and when it was fraught with the greatest risk and danger to undertake a journey across the continent, I ask would it not have been competent for the President of the United States, or the Department of Justice, to have provided him with an escort, civil or military, sufficient to guarantee his safe journey in the discharge of his duties, and enable him to discharge those duties, give him safe transport through the country inhabited by the unfriendly Indians? May we not test this power by extreme illustrations to discover the authority without in any degree weakening the principle applicable to less severe tests and exigencies of a different character and yet effecting the same end, and if the power to protect exists at all, must it not exist in all cases where protection is needed? Take it at a time when litigants, persons who are seeking to

have their differences adjusted in this Court, depended solely upon the Justice coming from the City of Washington to this Circuit for the purpose of presiding in this Court. Will it be said, that while the Justice was in the act of coming from Washington to take his seat upon the bench of the Circuit Court that he was not as much in the discharge of his duty as when he stepped into the Court room, and the Marshal opened Court? It was as much in the line of his duty to pass from one section of the Union to the other for the purpose of opening a session of Court as it was for him to actually open Court and engage in hearing a cause in the Court room, because the former is as much required by express legislation as the latter duty. In addition to that there is no time, and no place where a Justice of the Supreme Court of the United States may not exercise certain Judicial powers. He is at all times for certain purposes in the discharge of his official duties. He might at any moment of time, at any place, within the confines of the United States, be approached in his judicial character and asked to perform a judicial act. Take this very occasion when Justice Field was at the town of Lathrop. In addition to the fact that he was actually engaged in traveling to and from the Southern District of the State to this District for the purpose of holding Court, it might have so happened that some litigant should have applied to him for an injunction or to perform many acts that he might have performed there in his judicial character. Had he been in the act of issuing an injunction at the instance of a litigant would it be contended for a moment that he was not then in the discharge of his official duties, and that any attempt to interfere with him in the discharge of that duty was not a violation of the law, and a contempt of the Court, and possibly a contempt of the Supreme Court of the

United States? If he was in the act of performing some judicial duty as Asssociate Justice of the Supreme Court of the United States, and he had been interfered with; if he had been assaulted or insulted by a litigant, or officer of the Court, when he was exercising powers peculiar to his office as Associate Justice of the Supreme Court, and not in pursuance of his power as presiding Justice of this Circuit, it would have been a contempt against the highest tribunal known to the land. I do not understand when a Judge or a Justice, either of the Federal or State Courts, takes his seat on the bench in a Court room, and through the mouth of his bailiff has Court opened, that he loses his identity in any way as a Judge or Justice, as the case may be. For certain purposes he is considered then a Court, and not a Judge, but still he does not lose his identity as a Judge or Justice. There is no question, if indecorous language is used towards him, or an insult is offered him when he is presiding, but what the person doing so is offending against the laws of the country. The offense may be of such a nature that it becomes personal, and is directed to the Judge independent of the Court, yet the personal indignity offered is an offense. If it should be an assault, there would be a breach of the peace committed, and any officer who was present, or any one else, would have a right to interfere. Under the obligations that rested on the petitioner, if he were present, it would not only have been his privilege, but his duty to have interfered and prevented it, as I shall show hereafter. In order to determine whether or not this petitioner was acting under a law of the United States, counsel has suggested that we must point to some specific express declaration found in the statute authorizing the act done. But this cannot be and in the light of the authorities cited it is not so. It is not

to be expected that we point to a statute that authorized the petitioner in this case to kill or take the life of David S. Terry. But they say that we are required to find some act of Congress, some specific act upon the statute books which directed him in his official duty to accompany the Justice of the United States Supreme Court to Los Angeles and return, and to protect him, or else he is not within the principles of the Habeas Corpus Act. The Constitution of the United States is not only a grant of powers but establishes the agencies of government by which those powers shall be exercised, and defines the duties and powers of those agencies in administering the affairs of Government. The Constitution is one of the supreme laws of the land. It is as much a law as an Act of Congress passed in pursuance of it. It is the law by which all laws are tested, every power granted by it and every duty imposed upon the instrumentalities of government established by it necessarily implies the right to use every means necessary to carry out those powers and to execute those duties. The implications growing out of the constitution and laws passed thereunder are as much laws as the express letter of either. As these propositions were so ably argued by my Associate, Judge Mesick, I shall not consume time by extending upon them, but will simply suggest that the power lodged in the Executive branch of this Government by the Constitution, and which was delegated to the Government by the people of the States through that instrument, is vested in the President of the United States. It is not only a power lodged with him, but he is required under the solemn obligations imposed upon him by that instrument to see that the laws passed under it are executed in every part of this Union. So far as his office is concerned, when the Constitution enjoined

on him "to take care that the laws are faithfully executed," impliedly incident to that authority and that direction was given him every power of the Government, civil and military, for the purpose of executing them. Through the course of events, it came to the ears of the Executive, through the Department of Justice, that there was a Judicial officer of this Circuit, one of the highest known to our system, who in the discharge of his official duties had offended a litigant at the bar of this Court; that that litigant had become so enraged that he had even gone to the extent of threatening the life of the Justice; that he had done all he could to intimidate him from coming to this Circuit from the City of Washington in the discharge of his official duties; that, from what had been said, not only those in authority in the Government of the United States, but the entire people, had become concerned lest, if Justice Field should come to this Circuit that violence would be done to his person, and his life would be in danger. Justice Field, out of a sense of the duty, the obligations of the Constitution, and laws of his country resting upon him, fearlessly came to this Circuit in the discharge of his duties, without regard to any apprehension of trouble, or without having any knowledge of the provisions that had been made for his security while engaged in the discharge of his duty. To say that the power of protection does not exist under the circumstances of this case, as was suggested in the case of *Tennessee* vs. *Davis*, admits a weakness in our institutions that cannot be found in the Constitution ; and if so found, it means that the Government does not possess the power of self preservation or the power of executing its own laws, because it can only be done through the agency of her officers. But if the Justice was entitled to that protection, who was to afford him that protection? He

was in the discharge of his duties. He was commissioned to execute the laws of the United States; the Constitution devolves the duty on the President of the United States to take care that the laws of the United States are executed. It was then lodged in the Executive Department of the Government to afford him, a Judicial officer, protection, and such protection as might be necessary and essential in order to enable him to carry out and execute the laws and discharge the official duties resting upon him. This authority is not lodged anywhere else. It must have emanated from the Executive. I do not contend it would have been incompetent for the Federal Courts or the State Courts, if they became alarmed or were threatened with violence at the hands of a mob or a litigant—if there was such a state of feeling—if the Judge was in danger, or his life threatened, or he was liable to violent assaults, I do not pretend to say that the power does not exist in the Court itself to direct the things to be done that were directed to be done by the President in this case, but it is lodged in both. The Court must have the power of self-preservation and self-protection as well as any other department of the Government upon whom the duty is devolved of executing the laws of the country. Chief Justice Marshall said in the case of *Osborne* vs. *The Bank of the United States*, that it was incidental to and is implied in the several Acts creating the department; that the implied authority existed for protection. It is incidental to and grows out of the Acts creating them and defining their duties. The Judicial Department is not mentioned in that connection, but it applies with equal force, and for the same reasoning to the judicial power of the Government. The instruction given to the Marshal by the Attorney-General was an executive act, thoguh it emanated from the Attorney-General. The Attorney-

General is but the Secretary, in a manner speaking, of the President of the United States. He is essentially a part of the Executive branch of the Government, the President being the head, and every word, every order, every direction emanating from the Attorney-General, who *is the head of a department* in the Executive branch of the Government impliedly, and as a matter of law, has the sanction of the President and is the President's act.

Upon the question of the powers of the President to direct certain things to be done within his Executive authority, and how those directions are to or may emanate, and the duty of those to whom they are addressed to obey them, the case to which I am about to make reference seems to hold that an order issued from a Department becomes the act of the President, and to have the force and effect of a law, and that those to whom they are directed are obligated to follow them. It was a case under the Alien and Sedition Laws. The title of the case is *Lockington* vs. *Smith*, 1st Peters Circuit Court Reports, page 466 *et seq*. The President had been authorized by Congress to adopt rules and regulations for the removal of aliens, who might be dangerous to the public safety, beyond the jurisdiction of the United States, and he adopted certain rules and regulations. By the terms of the Act of Congress, the Marshal was specifically directed to act under the warrant of the President in certain matters pertaining to the removal of alien enemies, in other matters he was not directed by the Act to act at all, but, through orders issued by the Secretary of State and the Commissary-General, the Marshal was directed to perform certain duties not devolved upon him by specific provisions of the Act. The Marshal had made arrests without the warrant of the President

but under orders issued by the Secretary of State and the Commissary-General. It was contended that these orders were not orders of the President, that such orders must have been made by some public act of his own and under his seal. The Court in disposing of this question, said:

"The Department of State is one of the organs of the Executive branch of the Government, established for the purpose of facilitating and conducting the operations of that branch so far as the duties assigned to it extend. The business of that department is by law to be conducted in such manner as the President may direct. It is to this department that a reference must be made for the official acts of the President in relation to those public measures which he may establish, and which are not more immediately connected with the duties of some other department. This has been the general practice of this branch of the Government, and it is fully warranted by law. Nevertheless, the President, for the more easy and expeditious discharge of his executive duties, may direct some other department to make known the measures which he may think proper to establish. They are equally his acts, whether they emanate from the Department of State *or from any other department*." It was further insisted that the Marshal was not justified in making arrests under orders issued by the Secretary of State or the Commissary-General without the sanction of the judicial authority. But the Court held that he was; that is, that it was his duty to follow the orders of the Secretary and the Commissary-General because they were orders from the President.

The effect of this decision is that any executive act done by either of the Secretaries of the Departments, or the head officer of any department of the Government within its executive branch, is the act of the President of the United States. It follows that the direction of the Attorney-General, the order of the

chief officer of the Department of Justice (which is a department of the Executive branch of the Government) to his subordinates, is a direction by the President of the United States. The President, through the head of the Department of Justice, said to Marshal Franks: one of the Justices of the Supreme Court, who is about to come to your State, and within your district, for the purpose of holding a session of the Circuit Court pursuant to a law of the United States, has been threatened, and it is feared that violence may be done to him, and he may be interrupted in the course of the discharge of his duties. You see to it, that he has ample protection against violence and assaults at the hands of the persons who have been threatening to interfere with him in the discharge of his official duties. That is the direction to the Marshal by the President of the United States. To say that that is not a law of the United States; to say that the President of the United States had no authority to execute such an order, when the Constitution of the United States itself enjoins upon him to take care that the laws are enforced, I am unable to understand how far short of a law it falls, and how there could be a more positive declaration of law than it is. It is a principle well established in all the books, and cannot be refuted by respectable authority, that whenever an act is required to be done, all the necessary means and powers to carry out the act are implied in it. The President is charged with the duty of enforcing the laws of the United States, and impliedly he has every power and can use every instrument of the Government to effect that end.

Before passing on to another view I desire to present in support of the general powers of the President and Executive, the powers resting in the Government

somewhere, to enforce the laws and afford protection to its officers, to call the attention of the Court to the expression made by a very eminent lawyer known to the history of the entire country, and who recently occupied the position of Secretary of State. I allude of course, to Ex-Secretary of State Bayard. He says: "The robust and essential principle *must* be recognized and proclaimed, that the *inherent powers* of every government which are sufficient to authorize and enforce the judgments of its Courts are equally and at all times and in all places sufficient to protect the individual Judge who fearlessly and conscientiously, in the discharge of his duty, pronounces those judgments."

The Government of the State is after the same model, projected upon the same principles, and is of the same fashion as the Federal Government. The principles contended for in this case are equally applicable to the States of the Union as to the Federal Government. Will it be conceded by the advocates for the State in this case that there is no power in the sovereignty of the State to protect their officers in the lawful discharge of their official duty? Will it be conceded that the Judges of the Superior Courts of the State of California have no protection against threatened assaults and violence for official acts at the hands of discontented litigants upon whose causes they may have passed? If a Judge of one of the Superior Courts of this State was threatened by a litigant with death or violence, and the State authorities knew that fact, and knew the life, character and reputation of the person making the threats, if it had reason to believe from all the circumstances and the person concerned, that the life of one of the Judges was in peril by reason of some judicial act he had performed, will it be contended that there is no power in the Government to protect that officer in the

discharge of his official duty? Is it true that either the Federal Government, or the State Government says to its judicial officers when they step outside of the Court room that they must arm, equip and arsenal themselves, and that they are thrown upon their own personal protection against assaults that may be made upon them for discharging their official duty? It would seem to me this would lead back to the old ancient method of trial when litigation was settled by wage of battle instead of the more modern methods when it is settled by the moral force of the Court, and the Judge would be substituted in that wage of battle for the litigant in favor of whom he had decided. It seems to me we are too far removed from semi-barbaric times, and semi-barbaric conditions prevailing among the people to establish such a precedent, and to confess that such is the weakness of our government. If the Governor of the State of California, in the exercise of his executive duties, was informed that one of the State Judges of this State, when, as it was formerly, a number of counties, constituted a district, the judges had to go from one county to the other for the purpose of holding Court pursuant to a law directing and commanding them to do so; that in consequence of certain things growing out of litigation that had been before him, a condition of affairs existed which made it extremely hazardous for him to pass through a given community, or to go into a particular county of his district, is it possible that there is no power in the government to afford him protection, and to enable him to be protected in the discharge of that duty? The principle we are endeavoring to maintain is not one that obtains alone to the Federal Judiciary or to the Federal Government, but it is one that obtains with equal force to the State Judiciary, and those who are here representing the State, it seems to me ought to be in

full sympathy with it. It does seem to me that all good law-abiding citizens of the State of California, who are also citizens of the National Government, should be in common sympathy with the principle contended for by us in the case at bar; that the same rule that applies to the Federal Judiciary may be essential at some time to protect and enforce the laws of the State and protect its Judges in discharging their official duties under the Constitution and laws of the State.

We are not asking to have a rule established to be peculiarly applicable to the Federal Government, but a principle that may equally operate to protect the Judiciary, whether it be Federal or State. We are not engaged in a contest for Federal supremacy over State authority. We are seeking to establish a doctrine equally potent, and equally the servator of the general welfare, State as well as Federal. The powers incident and inherent to all Courts are incident and inherent in the Federal Courts, limited by such restrictions as may be put upon them by express provision of law. Every essential power to proceed within their jurisdiction to judgments and decrees, and the enforcement of them is implied or inherent. The very first essential of the discharge of the high duties devolving upon them with perfect freedom of conscience, and with fearless independence is that they shall be protected from the animosities and indignities and violence engendered by adverse decisions to heated litigants. The inherent power to punish for contempt has always been upheld and exercised throughout ancient and modern jurisprudence. There are contempts in Court and out of Court. It is an offense for which fine and imprisonment may be imposed. To assault a Judge, or vituperate a Judge at any place on account of any Judicial act is a contempt. Any act that may be pun-

ished as a contempt of Court is forbidden by law. There may not be any express provision of statute, but if the inherent power exists to punish for certain acts, then such acts are forbidden by law. Judges throughout modern jurisprudence are held to be privileged, not by express provision of the statute, but by something of equal force and binding obligation on the citizen and that is by judicial decision. It has been repeatedly held that the Judge is not civilly liable even for corrupt misconduct in the discharge of his official duties, nor is he criminally liable, nor can he be arraigned at the bar of Justice however corrupt he may have acted in the discharge of his official duties. Such is the effect of the decision in *Borden* vs. *The State*, 54th American Decisions, page 217, also in *Cunningham* vs. *Bucklin*, 18th American Decisions, 432; *Stone* vs. *Graves*, 40th American Decisions, 131; *Pratt* vs. *Gardner*, 48th American Decisions, 652.

I am leading up to the proposition that the assault made upon Justice Field at the breakfast table at this eating station at Lathrop, San Joaquin County, on the 14th of last month, was a contempt of this Court. A contempt may be a breach of the peace and it may not. If this was a contempt of Court at all, it was a breach of peace as well. It was committed by a person who held a peculiar relation to the Court, and to that Judge. It was committed by an officer of this Court, a man who had taken his solemn obligation as an officer of this Court, to maintain the respect due the officers of this Court. Let us see what the obligations of an attorney are. This is a quotation from an opinion rendered by Mr. Justice Field. It is the case of *Bradley* vs. *Fisher*, 13 Wallace, 355. "But on the other hand the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar."

(In this case the oath taken by Terry was introduced in evidence, and is the usual oath taken by attorneys of this Court) "is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to Courts of Justice and the Judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open Court, but it includes abstaining out of Court from all insulting language and offensive conduct towards the Judges personally for their judicial acts. 'In matters collateral to official duty,' said Chief Justice Gibson in the case of Austin and others, 'the Judge is on a level with the members of the bar as he is with his fellow citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the Court. Such would be the consequences of beating or insulting a Judge in the street for a judgment in court.'"

I have not the authority here, but I will refer your Honors to it, holding to the doctrine that assaulting and beating a Judge without the Court, when the Court is not in session, for an act done by him while holding Court, is a contempt of Court. I will now read to your Honors from the case of the *United States* vs. *Annonymous*, found in 21st Federal Reporter, in relation to this question of contempt, and particularly bearing on the limitations supposed to be placed on the Federal Courts by the Act of March the 2nd, 1831. "The next contention of the respondent is, that our Act of Congress of March 2d, 1831, c. 99, has deprived the Court of the power to punish for such contempts as that alleged against him. It is generally understood that the object of that statute, which has been substantially enacted in Tennessee and other States, was to enlarge the liberty of criticism by the press and others by curtailing the power to punish adverse comments upon the Courts, their officers and proceedings, as contempts

which tend to impair respect for the tribunal, and thereby obstruct the administration of justice."

In the case of *Neel* vs. *The State*, reported in the 50th American Decisions, 213, in relation to the matter of assaults on Judges, in 4th Blackstone's Commentaries, page 283, that writer says: 'The contempts that are thus punished are either direct, which openly insult or resist the powers of the Court of the persons of the Judges who preside,' etc., and at page 285, in enumerating the contempts which degrade the judicial authority, he refers to one which consists 'in speaking or writing contemptuously of the Courts or Judges, acting in their official capacity.' It is obvious that in these two clauses the word 'judges' is not used by the writer for the mere purpose of illustrating his meaning in the use of the word 'court', for, besides the consideration that this view is not sustained by the context, such an explanation of his meaning is so altogether futile and useless after his luminous exposition of the Courts in his third volume, as not to be attributed to a writer so able and perspicuous. On the contrary, it was evidently his purpose, in the first clause, to take the distinction between a disrespect of the constitutional powers of the Court, and a personal disrespect of the Judges therein sitting; and, in the second, between a contempt of the Judges while actually holding a Court, and a contempt of the same persons while in discharge of judicial duties appertaining to their official character, though not performed in Court. The opposite construction would produce a complete identification of the Judges with the Court so as to make a contempt of the one or the other perfectly convertible. From which may be deduced the clear privilege of the persons of the Judges, in or out of Court, when acting in their judicial capacity; not because of any imaginary sanctity of their persons, nor because that an indignity to their persons, when so engaged, obstructs the course of justice, for it might sometimes be of such a character as not to have that effect (and, besides, in that aspect it is always referable

to another head of contempts; that is, for obstructing the powers of the Court), but because, to use the words of Blackstone, 'it demonstrates a gross want of that respect which, when once Courts of Justice are deprived of, their authority (so necessary for the good of the kingdom) is entirely lost among the people.' Nor, to produce this effect, is it of any importance whether the contumely be used in open Court at the moment when the occasion occurs, or the moment afterwards when the sheriff has proclaimed the adjournment. The only real question in either case is, whether *it is the official conduct* for which the Judge *is challenged and insulted.* Nor can a reason be offered for the protection of the person of the Judge in Court that will not equally apply to a protection out of Court on the same account, in view of the remark we have already made, that whenever the indignity in open Court would have the effect to interrupt its business, the attachment would be referable to the head of obstructing the powers of the Court.

"An ideal, imaginary being, without form, substance or locality, needs no protection from penal sanctions. A Court, separate from the persons who compose it, is of this description. A sensible writer has said that 'the terms nation, state, community, are words only; they do not denote anything separate from the individual members whose aggregation and association have received these names;' and the like may be affirmed of a Court of Justice."

That his Honor, Justice Field, was in the discharge of his official duties at the time he was assaulted by David S. Terry there can be no question, because he, according to the evidence in the case, was passing from the Southern District of this State to the Northern District, coming to this city by the most direct route possible, and in an uninterrupted journey up to that time, for the purpose of holding a session of this Court. That he was assaulted by reason of some judicial act that he had performed affecting the interest of the assailant and deceased is an undisputed fact in this case.

That the assault, if an offense, was a contempt I shall attempt now to show.

In the case of *New Orleans* vs. *The Steamship Co.*, 20 Wallace, 387. the Supreme Court of the United States have said that a contempt was a criminal case. There had been a fine imposed in this case for a contempt of Court.

"Contempt of Court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case."

This is a positive declaration by the Court, and the question was whether or not it was a criminal offense, and whether it was a criminal case. They held it was both.

I have laid the foundation for the purpose of showing that the petitioner did nothing more than his duty and that independent of instructions from the Attorney-General or the President it was his duty under the laws of the United States as a Deputy United States Marshal to have done the acts he is complained against for doing. My own judgment is that this case rests on higher authority, that the true doctrine of this case is, that the President of the United States, as the Executive Officer of this Government, has not only the power, but it is his duty to protect judicial officers in the discharge of their judicial duties by furnishing them with whatever protection may be necessary. But what views your Honors will take we are unable to determine at this time, and we deem it proper to present such propositions as occur to us upon which this case may be sustained.

The petitioner in this case was a United States Deputy Marshal. That is an ungainsaid fact established in the case. He was appointed by competent authority, and had properly qualified as such for this

District. By the provisions of the Revised Statutes of the United States, for the purpose of the point now suggested, the Marshal and his Deputies are clothed with the same powers that the Sheriffs of the various counties of this State possess with relation to the law of the State. "The Marshals and their Deputies shall have, in each State, the same powers, in executing the laws of the United States, as the Sheriffs and their Deputies in such State may have, by law, in executing the laws thereof." Section 788, Revised Statutes of the United States.

By Section 4176, Subdivision 3, it is made the duty of the Sheriff, to "prevent and suppress all affrays, breaches of the peace, riots and insurrections which may come to his knowledge."

While it is not contended that the Deputy Marshal has the power of the Sheriff in executing the State laws, at the same time it is contended he possesses whatever power the Sheriff has for the purpose of preventing a felony, and it was his duty to use the same means and adopt the same course, and use the same power that the Sheriff could and should use, were a breach of the peace committed in his presence. If in the first place to assault a Justice or a Judge outside of the court room for some judicial act performed by him in court, is a contempt, and a breach of the public peace and a crime under the Federal decisions, then it was the duty of the Deputy Marshal, independent of any authority from a higher source, than his statutory duty, to interfere and use all necessary means to prevent the commission of that crime, and to prevent the commission of that assault on Justice Field. In the light of the authorities, and the evidence in this case, it seems to me there can be no question but what it was a contempt of this Court to make an assault upon the Justice under the circumstances and that it could

be punished as such by this Court, it was an offense in the nature of a crime against the dignity, majesty and peace of the United States, and it was the duty of this officer had he merely happened to be there, knowing the facts, to interpose, to prevent a violation of the law and to use all necessary force to prevent the commission of it. On this theory the way is clear.

I will not take up your Honors' time by referring to the statute and the authorities which authorize Sheriffs to make arrests without a warrant, because there can be no question about it. The duty to arrest is imposed upon him in all cases of felony, and breaches of the peace, when it occurs in his presence, without a warrant or any further authority. But the Deputy Marshals, by express provisions of Federal Statute, have the same powers in executing the laws of the United States that Sheriff's have in executing State laws. Then, if the acts of Terry, in making the assault he did upon Justice Field, were in any sense an offense or a breach of the peace under the laws of the United States, it was the duty of the petitioner to have used every necessary means to prevent it. We submit that the acts of Terry were a breach of the National peace because they were directed to the interference with a Federal officer for acts done in his official capacity and who was then at the time in the line of discharging his official duties. If this be so, then the case of the petitioner is clearly within the provisions of Section 753 of the Revised Statutes, which entitles this Court to inquire whether or not he kept within the line of his duty because it was an act done under the laws of the United States. If the assault made by Terry upon Justice Field had occurred in this Court room, just before the opening or just after an adjournment of the Court, will it be seriously contended that if the petitioner had been

present that it would not have been his duty to interfere and prevent it, and that he would have been entitled to use all necessary means to prevent it?

If the law then throws its shield about a Judge and relieves him from personal liability for any act done in the discharge of his official duties whatever may be the motive that prompted him and however corrupt this may be, and this upon principles and a policy which is alone intended to preserve the dignity and respect due our Courts among the people, how much the more does this same policy demand a protection to them from personal assaults, acts of violence and indignities from suitors or litigants and others for acts done in the discharge of their official duties.

The Judge, while on the bench, is protected from indignities, assaults and violence.

Is there any reason that can be urged for the protection of the person of the Judge in Court, that does not obtain with equal force out of Court when he is in the discharge of his duties?

The powers of the Court are exercised by and through the Judge, the administration of justice can only be affected through their agency, and any condition of circumstances calculated to deprive the Judge of that proper regard, esteem and respect among the people, that would command obedience and peacable submission to his orders, decrees and judgments as a Court, must be subversive of the power and authority of that Department of the Government. Justice Scott, in *Neel* vs. *State*, 9 Ark., 259 Am. Dec., 214. In passing upon the complete identification of the Judges with the Court, and discussing contempts against the constitutional powers of the Court and personal disrespect for the Judges, says, "From which may be deduced the clear privilege of the persons of the Judges, in or out of Court, when acting in their judicial capacity, not

from any imaginary sanctity of their persons, nor because an indignity to their persons, when so engaged, obstructs the course of justice, for it might some times be of such a character as not to have that effect, because, to use the words of Blackstone, ' it demonstrates a gross want of that respect which, when once Courts of Justice are deprived of, their authority (so necessary for the good of the kingdom), is entirely lost among the people. * * * *The only real question is, whether it is the official conduct for which the Judge is challenged and insulted.*' Nor can a reason be offered for the protection of the person of the Judges in Court that will not equally apply to a protection out of Court on the same account." * * * An ideal imaginary being, without form, substance or locality, needs no protection from penal sanctions. A Court separate from the persons who compose it, is of this description. But who is to afford that protection to the Judges that will not allow them to be insulted or challenged for their official conduct, unless it be the officer whose duty it is made to attend upon them? We submit that, over and beyond the special instructions of the Attorney-General, it was the bounden duty, under the laws of the United States, for the petitioner to have interferred to protect the Justice and to preserve the public peace.

I shall not discuss or analyze the testimony. It is all one way. But I shall call your Honors' attention to the law that will govern the justification of the petitioner in the course he pursued, and which furnishes the rule to determine as to whether he used any more force than was necessary to accomplish the duty that was then devolving upon him.

By the provision of Section 196 of the Penal Code of this State it is provided:

" Homicide is justifiable when committed by public officers, and those acting by their command in their aid and assistance, either—

"1. In obedience to any judgment of competent court; or,

"2. When necessarily committed in overcoming actual resistance to the execution of some legal process, *or in the discharge of any other legal duty.*"

This must apply as well to Federal officers as to State officers. While it is not the rule of this Court to determine in a case like this whether or not the petitioner was justified, at the same time the State authorities being here, and insisting that the State Courts have exclusive jurisdiction over this matter, and that this Court ought not to inquire whether the petitioner was justified in doing the acts he did, it may be proper to present the State law upon the matter involving the justification of the petitioner.

Under Section 197, subdivision 3, it is provided that homicide is justifiable when committed by any person in the lawful defense of a master, etc., when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury and imminent danger of such design being accomplished; such person or the master not being the assailant or engaged in mortal combat.

Section 198 of the Penal Code, is as follows: "The bare fear of the commission of a felony or to do some great bodily injury is not sufficient. But the circumstances must be sufficient to excite the fears of a reasonable person and the party killing must have acted under the influence of such fears alone."

I now read from Bishop's Criminal Law, Section 627:

"There are two kinds of defense which a man may make of his person, the one extends when necessary to accomplish the object to the taking of the life of the aggressor, and this we shall call in the present chapter, perfect defense."

Bishop's Criminal Law, Section 625. "It has been held that if one is assaulted by another who has threatened to kill him he is not bound to run and escape in the particular instance, thus increasing his danger by encouraging the assailant to repeat the attempt when he will perhaps be less prepared to resist."

"In ancient times a person who committed a felony was always adjudged guilty of death, and this may be the reason of the legal rule which certainly has established itself firmly in the laws, both of England and of our States, that one may oppose another attempting the perpetration of any felony to the extinguishment, if need be, of the felon's existence. An illustration of the last proposition is afforded in the familiar case of a person attacked by another intending to murder him who thereupon kills his assailant. He is justified and though his justification is put also on the somewhat vague right of self-defense it grows equally out of the fact that he was resisting a felony."

(Bishop's Criminal Law, Vol. 2, 633.)

"But where an attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground, and, if need be, kill his adversary." (Bishop's Criminal Law, Vol. 2, 632.)

"The right of self-defense is commonly stated in the American cases thus: if the person assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kill the assailant, the killing is justifiable." (Bishop's Criminal Law, Vol. 2, 644.)

Supported by a long list of cases cited.

"In Selfridge's case it was said that, when from the nature of the attack there is reasonable grounds for a man to believe that there is a design to destroy his life or commit any felony upon his person, the killing of the assailant will be excusable homicide, though it should afterwards appear that no felony was intended." (Wharton's Criminal Law 4, Rev. Ed., 1026.)

I will also read Section 1021, on the same subject: "There may be cases sometimes occurring, though very rare, and of dangerous application, where a man, in case of personal conflict, may kill his assailant without retreating to the wall. The assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defense, if there be no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape, although he would; in manslaughter, he would not escape if he could. Thus, if A assaults B so fiercely that giving back would endanger his life, in such case it is agreed that the party thus attacked need not retreat in order to bring his case within the rule of necessity in self-defense; or if, in the assault, B fall to the ground, whereby he could not fly, in such case, if B kill A, it is in self-defense upon chance-medly; such were the principles laid down in Selfridge's case."

Section 1030 of Wharton's Criminal Law is as follows:

"Officers of the law, when engaged in the performance of their duties, are invested with a peculiar prerogative If resisted when so employed, and the party resisting be killed in the struggle, such homicide is justifiable. And, on the other hand, if the party having such authority, and exercising it properly, happen to be killed, it will be murder in all who take part in such resistance, though there be no malice. The rule is not confined to the instant the officer is on the spot, and at the scene of action engaged in the business which brought him thither, for he is under the same protection going to, remaining at, or returning from the same."

This doctrine of protection in going to, remaining at, or returning from the place where a particular official act is to be done, applies with pertinent force to Justice Field, when he was going from San Francisco to

Los Angeles, and returning. He was entitled to the same protection at that time as he was when he took his seat on the bench of the Southern District of this State for the purpose of opening the Southern District. Whatever Justice Field would have been justified in doing under the circumstances, this petitioner would have been justified in doing. He was the shield and buckler of the Justice. It was his duty when this assault was made to prevent it, and to use all necessary force to do it. To take all precautions, to see that his original instructions were carried out, and that was, that violence should not be done to the Justice. It may be, under the facts developed, that for a moment the attention of the assailant was attracted, because of the interference of this officer, from the Justice, from the thing he was bent on doing, to an attack on this officer. It was only for the purpose of removing the obstruction which stood in the way of his original design, which was to make a violent assault, or do bodily harm, or take the life of the Justice. But the petitioner being there for the purpose of protecting the Justice, it was his bounden duty and prerogative to protect himself as the shield, guard and protector of the person against whom the original intent of the assault was directed.

Under the circumstances developed by the testimony and the law applicable to the facts of this case, it must be apparent that this petitioner was justified in every act he did and performed at Lathrop on the morning of the 14th of August, 1889; that if he had done less than he did do he would have fallen short of his duty.

I respectfully submit that the Court should retain jurisdiction of this case and pass upon the facts and the law of the case; that the acts done by the petitioner

were acts done under the laws of the United States; that the petitioner is entitled to his discharge and should be discharged with commendations for the fortitude, judgment and faithfulness with which he discharged the responsible duty that devolved upon him.

Brief

No. 10,469.

IN THE

Circuit Court of the United States,

NINTH CIRCUIT,

Northern District of California.

IN THE

Matter of DAVID NEAGLE

UPON HABEAS CORPUS.

ORAL ARGUMENT

OF

SAMUEL M. WILSON

ON BEHALF OF PETITIONER.

ARGUMENT.

Argument of Samuel M. Wilson on Behalf of the Petitioner, David Neagle.

May it please the Court :—

This case has been characterized by one of your Honors, as a case of unusual importance, and as involving propositions requiring great attention and profound consideration. This is very true, and the Court has undoubtedly been greatly interested and much edified by the forcible arguments and great learning presented and shown by the able counsel on both sides, who have preceded me in the discussion.

The great question which usually arises in cases of homicide—the question whether David Neagle, the accused person, was *justified* in the homicide admitted to have been committed by him—is almost entirely subordinated here to the question of the conflicting claims of jurisdiction of the Courts, and the inquiry of the powers of the State and Federal Governments.

We behold, in fact represented here, the two sovereignties—the State Government and the United States Government—the one represented by its chief law officer, the Attorney-General of the State, and his associates, and the other by the United States District Attorney and his associates. The Attorney-General claims that the act of the petitioner Neagle, is a crime against the State, cognizable exclusively by the Courts of the State. The counsel of the United States claim that the act was one performed by the petitioner under and pursuant to the laws of the United States, and that the petitioner being imprisoned for such an act by the State authorities, is entitled to be discharged from that custody, on the writ of *Habeas Corpus*, by this Hon. Court. These are the questions presented, and they are not only interesting but involve fundamental and constitutional principles, affect-

ing the very elements of government, and the form and structure of our great institutions.

The able and learned Attorney-General expressed in the opening very great faith and confidence in the integrity and honor of the Judges of this Court. In that we most cheerfully concur in all respects, but it is strange that this unfortunate occurrence at Lathrop, which resulted in the homicide of the deceased, arose out of an assault upon the integrity and character of this very Court in which it was assailed in the most violent and vituperative manner. It is strange that the deceased ex-judge was himself at one time impugned in his judicial integrity, to which I may refer as a part of the history of the country, and went upon the field of honor to vindicate his character and integrity, as a judge, against slanders equally false, with those uttered against this Court. This experience should have taught him charity, for it shows how easily and unjustly such slanders and vituperations can be uttered against Courts by disappointed litigants.

What are the facts? For though they have been fully presented by the evidence, an epitome of them here may facilitate the determination of the Court.

I.

THE FACTS.

The important facts to which the law must be applied are as follows: The Circuit Court of the United States in 1888 was called upon to determine some important questions in cases to which Mrs. Terry, the wife of David S. Terry, as well as the latter, were parties —she being the principal party interested.

The cases had been heard and elaborately argued by counsel of the respective parties, and a long and able opinion was being rendered by the Court. The Court

consisted of Mr. Justice Field and Justices Sawyer and Sabin. Pending the reading of the opinion by the presiding Justice, Mrs. Terry was guilty of a gross and outrageous insult to the Judges and committed an offense far exceeding a mere ordinary contempt. She so far interrupted the proceedings of the Court as to make it necessary that the Court should order her removal from the court-room by the United States Marshal.

Pending the execution of this order, whilst the Marshal and his deputies were attempting to carry out the directions of the Court, they were resisted with great violence and assailed both by Mrs. Terry and by her husband.

Mr. and Mrs. Terry, however, were ultimately removed from the Court room, and detained in custody until the Court could finish reading its opinion and rendering its judgment in the matter before it.

The Court immediately afterwards proceeded to punish both Terry and his wife for this outrageous contempt and resistance of the officers, in the performance of their duty, and they were both sentenced to prison, the first for six months, the latter for thirty days.

Because of these judicial acts of the Judges, grave threats were made against two of them, Justices Field and Sawyer, which were only equaled by "the threatenings" of Saul of Tarsus, before his conversion, against the Christians.

That they counseled and conspired together to carry out their threats, is palpable from the evidence. It became manifest, that at any future time attacks would be made upon the Judges, whenever opportunity should favor either Terry or his wife. That such an attack would be made upon Mr. Justice Field, was

heard on the street-corners, proclaimed in the newspapers and rung in the very air.

This became so notorious and wide-spread, that even the Attorney-General of the United States took cognizance of it, and issued his instructions from Washington to the United States Marshal at San Francisco, to take measures for the protection of the Judges of the Court from this threatened violence.

Mr. Justice Field, in the fearless performance of his duties, returned again to California in the present year; held Court for a time at San Francisco, and proceeded to Los Angeles, in the Southern District of California, and there also held the Circuit Court.

Having finished his duties at the latter place, he started upon his return to San Francisco, to resume again his official duties at the latter place.

The train from Los Angeles to Lathrop passed in the night time through the town of Fresno, which was then the residence of Mr. Terry and wife. Whilst Judge Field was in his berth asleep, Terry and his wife entered the cars and became passengers.

In consequence of the letter of the Attorney-General of the United States to the Marshal at San Francisco, the latter had designated David Neagle, one of his Deputy Marshals, as a proper person to accompany Judge Field in the performance of his judicial duties, upon the trip to Los Angeles and back, for the purpose of protecting him against the conspiracy and threatened assault of Terry and wife.

At Lathrop, Mr. Justice Field, accompanied by the Deputy Marshal, went to breakfast. Shortly after, the Terrys entered the breakfast room, and discovering Judge Field there, the wife went back to the car for the purpose of obtaining a satchel of hers, which contained her pistol, whilst her husband was shown by the proprietor of the hotel to a seat at some distance from Mr. Justice Field and Deputy Marshal Neagle.

A very few moments, however, after Terry had been seated at the breakfast-table, and before the return of his wife, he arose from his distant seat, and, passing behind the back of Mr. Justice Field, without the knowledge of the latter, assaulted him from behind, striking him on the side of the face and head, first with one hand and then the other, in such a manner as to stun, daze and confound the Justice, Terry himself towering far above the seated magistrate, overlooking his shoulder and commanding the situation in such a way that even if Mr. Justice Field had had weapons, it would have been impossible for him to have used them before he could have been stricken down or cut to pieces by the assailant.

I merely notice, in passing, the violation of all chivalrous ideas and notions in assaulting a person in a contest certain to be deadly, in a room containing a number of ladies and children, fellow railroad passengers; and also the fact that this attack was made from behind in such a manner as to command all advantages and leave no opportunity at all for any defense to the assailed party, or even opportunity to fly or escape.

They are, however, worthy of notice in another point of view, for they manifest a studied, deliberate plan and intention to prevent any resistance and to place the assailed Justice in the absolute power and control of the assailant, without any opportunity for resistance. He could, with his superior strength and weight, have crushed and beaten Judge Field to death without any special weapon. But for the timely presence of Deputy Marshal Neagle, the renowned and venerable Justice of the Supreme Court would indeed have been killed without even a knowledge of his assailant, for he was there "past hope, past cure, past help."

Terry, at the beginning of the assault, was unaware of the fact that Mr. Justice Field was accompanied by the Deputy Marshal, and doubtless counted upon an easy victory over the venerable and unarmed Justice.

If Terry himself at that time had no weapon upon his own person, it was quite clear that he might well expect the prompt return of his wife with her satchel and pistol, to obtain which she had so hastily left the breakfast-room. She alone, with her deadly weapon, was capable of doing all that was necessary to dangerously injure, if not kill, Mr. Justice Field. But we may safely assume from the evidence that he was armed with a formidable knife, which, it was proved, he always carried.

At that point of time the Deputy Marshal raised from his seat, called upon Terry to stop and informed him that he was an officer, and partially interposed himself so as to protect Mr. Justice Field from the assault.

Terry immediately recognized him as the man who, in the deadly struggle in the United States Court-room building, had wrested from his hands the bowie-knife at the time of the proceedings before referred to.

As described by the Deputy, his face assumed the expression of intense hatred, and it seemed as if, at that period of time, he saw an opportunity for vengeance both upon the Deputy and upon the Justice, and whilst in the act of moving his hand towards his breast to obtain the knife which he always carried, the Deputy Marshal fired the pistol which caused the death of Terry and thereby saved, in all human probability and according to all appearances, his own life as well as the life of Mr. Justice Field.

It may be thought by some not well acquainted with all the facts, that Mr. Neagle acted too hastily, and

that he should have first tried other means before using his pistol. But a careful examination of the evidence shows that one moment's delay then meant death both to Neagle and Justice Field. Terry had already struck two blows. Was the Deputy Marshal to examine into Justice Field's condition, and see how many more blows he could endure? Should he only interfere when the Justice was more severely hurt? Should he wait until Terry had struck one blow with his bowie knife? This is too absurd for consideration. The Deputy Marshal, himself cool and collected, was the best judge of the proper time to act. He had a thorough knowledge of his assailant, for he had wrested the bowie knife from him in the U. S. Court building. He had seen him stand unmoved with pistols pointed at his head. He knew of his threats and desperate character. When the man-eating tiger leaves his native jungle for his prey, it means death to his victim. Would it be safe then to whisper the soft words of persuasion into the tiger's ear? Should one stop midway his leap upon his prey to see if, forsooth, he will indeed reach his victim? The shot was not one second too soon, and by it the lives of two officers of the law were saved.

It was for this offense that Mr. Neagle was arrested upon a warrant issued by a Justice of the Peace of the County of San Joaquin; and the question now arises, as to whether, in the performance of this act, under all the circumstances, *the Deputy Marshal was justified under the laws of the United States, and should, therefore, be discharged from imprisonment on this writ of habeas corpus?*

It must be remembered, and it is very important, too, to remember, that we have something more to deal with than the mere action of one private person against another. This transaction cannot be fairly con-

sidered without looking into the official character of the parties concerned. At the point of time we are now considering, Mr. Justice Field was an Associate Justice of the Supreme Court of the United States, passing from one District to another in his Circuit in the performance of his judicial duties. Although he was not holding Court, he was still possessed of judicial power vested in him by the Constitution and Acts of Congress, and he could at that time and in that breakfast room have granted orders in cases pending before him in the Court, and performed other acts of a judicial nature.

Terry at that time was an officer of the same Court, a member of the bar, having sworn in that Court to support the Constitution and laws of the United States, and to faithfully do and perform his duties as an attorney in that Court.

Mr. Neagle was a Deputy Marshal of the United States for the Northern District of California, and was then and there present and a witness to the assault then being made, and about to be further continued. Mrs. Terry, the accomplice and confederate of her husband, was a party to the suits we have referred to in the U. S. Circuit Court, and was about returning with her firearms, undoubtedly with the intention of assisting in the assault upon Justice Field.

It is manifest from the whole evidence that this assault on Mr. Justice Field was the overt act and result of a combination and conspiracy by Terry and his wife, to injure Mr. Justice Field in his person, if not to take his life, on account of his lawful discharge of the duties of his office in the cases referred to.

Such being the facts, what is the law applicable thereto.

II.

THE LAW.

Mr. and Mrs. Terry were both guilty of a violation of the laws of the United States.

Sec. 5518, Revised Stat. U. S., is as follows:

"Sec. 5518. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

Terry and wife in their assault on Justice Field committed an offense against the laws of the United States of *exclusive* cognizance in the U. S. Courts. The Courts of *San Joaquin County* could not have tried them.

Sec. 5328, Rev. Stat. U. S., read in connection with Sec. 711. *Ex parte Houghton*, 7 Fed. Rep., 660; *Ex parte Bridges*, 2 Wood, 429. Terry could have been discharged on *habeas corpus* on an arrest by State Courts.

Our contention then is that under the circumstances presented, the Deputy Marshal, Mr. Neagle, was authorized to interpose and prevent the commission of this crime, and if necessary to that end to take the life of Terry. His power to do so was derived from two

sources: 1st, by the authority conferred on him directly by the Acts of Congress; 2d, by the authority conferred on him by the Marshal and the Attorney-General of the United States.

The Deputy Marshal, as such, was clothed with the authority conferred upon him by a series of Acts of Congress. See especially Title "Civil Rights," Rev. Stats. U. S., Secs. 1980 to 1991; Chapter of Title "Crimes;" Rev. Stats., Sec. 787.

Unusual and extraordinary powers have been conferred upon the Marshal for the purpose of enabling him to execute the laws of the United States, by reason of facts and circumstances arising in the modern history of the country, making the extension of his power much greater than in former times; but his usual and ordinary powers are also defined, and among them the section of the Revised Statutes which has been referred to by the United States District Attorney.

"Sec. 788. The Marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the Sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

The Political Code to which the learned Attorney-General has referred to, defines the powers which Sheriffs have.

Section 4176 says:

"The Sheriff must:

1. Preserve the peace;
2. Arrest and take before the nearest magistrate, for examination, all persons who attempt to commit or who have committed a public offense;
3. Prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to his knowledge." * * *

Had this been a case merely of one private person assaulting another private person under the same

circumstances, what would have been the duty of the Sheriff? He is made a conservator of the peace; he is called upon to arrest every person who attempts a public offense; he is called upon to prevent and suppress all affrays and breaches of the peace that may come to his knowledge. Would it not upon well established principles have been the Sheriff's duty to attempt to stop the assault; and if he found it impossible to stop the assault and under all the circumstances and the exercise of good judgment and discretion, it appeared that the assailant was about to take the life of the assailed party, would it not have been the Sheriff's duty to have immediately killed the assailant?

There can be no question under the laws of California, that this would have been among the powers and duties of a Sheriff under like circumstances. The Marshal's powers being measured by the Sheriff's powers, there can be no doubt of the Marshal's duty and power under the laws of the United States to preserve the peace and prevent a violation of the laws of the United States; and if in the performance of that duty death resulted to the offending party, the Marshal would be justified precisely as the Sheriff in an analogous case under the State laws would have been justified.

The Penal Code of California reads as follows:

"Section 197. Homicide is also justifiable when committed by any person in either of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

2 When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors,

in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or, * * * * * *"

Sub. 3, relates to the self-defense of a person or of a wife, or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished.

"4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace."

Section 198 of the Penal Code further provides as follows:

"Section 198. A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone."

That the law justifies the killing of one who is in the act of committing a felony by violence or surprise is established by a series of authorities.

1 Whart. Crim. Law, 8th Ed , Sec. 484;
Burnett's Crim. Law, p. 57;
1st Hale's Pleas of the Crown, 484;
Harrigan & Thompson's cases of self-defense, 717, 750;
1 Bish. Crim. Law, 5th Ed., Sec. 877.

If a private person *may* commit and is justifiable in committing homicide under such circumstances, it is the *duty* of an officer to do so. It is his *duty* to prevent the felony or great bodily injury, and if he cannot prevent it, otherwise than by taking the life of the

assailant, it is his *duty* to take that life, because he is made a conservator of the peace and the law requires that he shall prevent and suppress affrays, breaches of the peace and public offenses.

Whart. Crim. Law, Sec. 230;
Ex parte Roberts, 2 Abbott, 281;
Burnett's Crim. Law, p. 65 and 57;
4 Blackstone Com., 179, 180.

The law justifies a homicide committed by a conservator of the peace, or by his order, in the suppression of a breach of the peace to prevent his authority from being set at defiance and the law in his person contemned; and if he kills when so resisted, or gives orders to use those means which are entrusted to him for the preservation of the peace, and this end in death, he is justified in so doing.

Burnett's Crim. Law, p. 161.

It would seem, therefore, beyond question that it would have been the Sheriff's duty under similar circumstances in the case of private persons and to prevent a felony from being committed under the laws of the State of California, to have taken the life of the assailant, and that it would have been justifiable homicide.

The same power being vested in the Deputy Marshal with regard to the laws of the United States, it would seem to follow as a matter of course that the action of the Deputy Marshal was equally justifiable. He was clothed so far as the laws of the United States are concerned with the same powers with which the Sheriff was clothed regarding the laws of the State of California, consequently it was his duty as a Marshal to interfere at once to stop Terry in his assault on Mr. Justice Field, and to take his life if necessary to prevent a crime which he was about to commit against the laws of the United States.

Therefore, there could be no doubt that under the circumstances the Marshal's conduct was entirely justifiable, for had he not taken the life of Terry at the time, it is very clear that the crime described in Section 5518 of the Revised Statutes of the United States would have been consummated, and Mr. Justice Field would have been injured in his person if not killed, on account of his having lawfully discharged the duties of his office in the cases in which both of the Terrys were parties.

If it be objected that Mrs. Terry, so far as she was a party to the combination and conspiracy to commit this crime, was presumed to have acted under the coercion of her husband, and hence, as held in some old cases, that there could be no conspiracy in such event: the reply is that the old doctrine of presumption of coercion of the husband over the wife *was a mere presumption which could be rebutted.* At common law it could be rebutted, and now it may be rebutted.

The whole doctrine is well stated by Mr. Desty in his Compendium of American Criminal Law as follows:

"Sec. 16. A married woman, in the presence of her husband, is presumed to have acted under his coercion, and such coercion excuses her, except in cases of treason, murder and robbery; but this presumption may be rebutted if the circumstances of the case show that in point of fact she was not coerced."

This is maintained by a series of authorities cited by the learned author, besides which we call attention to the following cases :

Commonwealth vs *Eagan*, 103 Mass., 71;
Regina vs. *Cruse*, 8 Car. & P., 552;
S. C., 34, E. C. L., 887;
Freel vs. *State*, 21 Ark., 213.

In 1 Hale's Pleas of the Crown, 516, after stating the presumption that the wife acts under the coercion of the husband, the learned author says:

"But this I take to be only a presumption till the contrary appears, for I have always thought, that if upon the evidence it can clearly appear, that the wife was not drawn to it by her husband, but that she was *the principal actor and incitor of it*, she is guilty as well as the husband, but *stabitur presumptio, donec probetur in contrarium;* neither is the book of 2 E. 3 *Corone*, 160, to the contrary, but in the book of *Assiz*, 40, where she was indicted alone, inquiry was made, whether it were by coercion of her husband."

The English editor in 1st Russ Crimes, 3rd Eng. Ed., pp. 18-25, after summing up in his notes the old English authorities upon the subject, observes:

"That the presence of the husband is no longer considered an *absolute excuse* but only affords a *prima facie* presumption that the wife acted by his coercion."

And in 1st Bishop on Criminal Law, the learned author says:

"Section 362. The presumption that the wife acts, in her husband's presence, under his coercion, is only *prima facie*—liable to be rebutted by evidence."

The authorities also show this presumption never did apply to such crimes as treason, murder and robbery, and some others.

Bishop cites a series of authorities to that affect. But the Penal Code of California is full and complete on this subject, and makes married women "capable of committing" all crimes except where "acting under the threats, command, or coercion of their husbands," and even that is no defense in felony. See Sec. 26, Sub. 7, Penal Code. This destroys the presumption, and makes it a matter of affirmative proof by the wife in defense.

See under similar Statute, *Freel* vs. *State*, 21 Ark., 213.

Modern legislation has now emancipated the wife, and especially in California where her own property at the time of her marriage remains hers, and she may make contracts with any person, even with her husband, and sue and be sued alone.

It is manifest, therefore, from all the evidence in this case, that there was a combination and conspiracy of Mr. and Mrs. Terry to injure Mr. Justice Field in his person, if not to take his life, against the provisions of the Revised Statutes of the United States, on account of his lawful discharge of the duties of his office, and that the Deputy Marshal, in pursuance of the powers vested in him by the Acts of Congress to which we have referred, interposed to prevent the commission of the crime, and that in doing so, the homicide was committed.

The act which Deputy Neagle did, was done in pursuance of the laws of the United States, and that is the very case in which the Courts of the United States are authorized to relieve him, discharge him upon habeas corpus, as provided in Sec. 753 *of the Revised Statutes.*

A series of decisions to that effect have been rendered in a number of the Circuit and District Courts of the United States, as well as by the Supreme Court itself, many of which have been cited by my colleagues, and upon which we may safely rely.

But independently of a mere *technical conspiracy*, the offense of Terry was a violation on his part of every obligation and duty to the Government as a citizen, *as well as of his oath as an Attorney of the Court.*

It was a blow at the very existence of an independent judiciary and introduced a precedent for violence, tending to intimidate the Judges and turn aside the course of justice. If disappointed litigants may assault Judges for their judicial action, or intimidate them by threats, then a reward is offered to the ruffian

and the peaceful and law abiding citizen is punished for his virtues. But such conduct imperils the cause of every good citizen, and deprives him of a fearless judiciary, and that, too, in a country which boasts that all stand equal before the law. It is an assault upon one of the three great departments of Government. The offense, therefore, has the smack of *treason*, and indeed in England to attack one of the King's Judges was to attack the King, and hence to commit treason. Hence also at common law, the duty of the Sheriff was, among other things, to attend personally or by deputy, on the Judges in *every Shire* through the Circuit and for a failure to do so he was liable to a fine and imprisonment. Thus the Judges were protected from violence, and if, notwithstanding such attendance, the Judges were assaulted, it was high treason.

I will refer your Honors on that subject to Dalton's "Sheriffs," Chapter 98.

Such an assault, therefore, upon a Judge, is necessarily and in the very theory of organized society, a *malum in se*—an absolute wrong in itself, independently of legislation making it a specific crime. Beside this, going to the existence of the Court, its officers have the inherent power of self-preservation, and it must be true that an integral part of an efficient system—the executive arm of the judiciary may justifiably strike the blow necessary to save and preserve the bench, of which it is but a limb.

Such an act is a duty of a Marshal; it grows out of the relation of the Marshal to the Judge as members of one system of judicature; it is a power which is ingenerate and inherent in the very structure of courts. When the power exists, the duty follows and should be exercised upon the proper occasion.

I claim, therefore, that independently of any express provision of law to that effect, an assault upon a Judge of the United States Court for a decision by him rendered in the performance of his judicial duties is, in its very essence, an offense against the laws of the United States, and that it is the duty of a United States Marshal or Deputy Marshal to protect the Judge from such violence and injury, and if the death of the assailant at the hands of the Marshal or Deputy Marshal results as a necessary means of resisting the attack, it is not only a justifiable homicide, but is an act done by the officer in pursuance of his duty as such officer, and hence done pursuant to the laws of the United States.

If, therefore, such an officer of the United States be held in custody by a State officer, for such an act of homicide, he is entitled to be discharged by this Court on a writ of *habeas corpus*, for he falls directly within the letter and spirit of the Revised Statutes of the United States (Sec. 753), which provides for his release if he be in custody for an act done in pursuance of the laws of the United States.

This becomes plainer, if possible, when we look at the nature and object of the writ of *habeas corpus* and its history in the Courts of the United States, which in a later part of my argument will be referred to.

I may stop for a moment to consider one of the propositions presented by one of the learned counsel on the other side, who urged some views in opposition to the jurisdiction of the United States Court with a great deal of force and ability, and which, I confess, requires some reflection to answer. He says there is no Act of Congress on the subject of protecting judges; that the nation at large has depended upon the police power of the State, and that

it was the duty of threatened persons to apply to the State authorities for the purpose of protection against threatened assaults, and that there is no other remedy except that, and in the absence of legislation by Congress upon the subject of such a police power, the law of the State upon the subject is the supreme law of the land. Judges passing through States, he says, must rely on and be amenable to the local police laws; that Congress has never enacted a law that Marshals shall accompany the United States Judges wherever they go; that the States have this reserved police power until Congress shall pass some Act on the subject; and that the State law until then is supreme and must prevail. He asks why an application was not made to the State Courts to bind the Terrys over to keep the peace. Why were they not arrested for these threatened assaults? Let us admit for a moment that those remedies would have been effective; that Terry and his wife both might have been arrested and bound over to keep the peace. Did that exhaust all the remedies which existed? Must one stop there? Was there no other resource than that? If one's life is threatened, and he be a private citizen amenable to the laws of California, and can look to the State law alone for a redress of grievances, has he no remedy against threatened violence except to bind the party over to keep the peace? And if he should fail to do that—fail to obtain that protection—does he lose the power of self-defense? Must he then submit to the assault when it comes? Is it in the power of the assaulting party to say, "When you knew that I threatened to take your life, you omitted to have me bound over to keep the peace, now you have lost the power of self-defense"? A moment's consideration shows how utterly untenable such a proposition is. Above all and paramount to

all of the special remedies provided for through the Courts, every man possesses at all times the inherent right of self-defense, and if he chooses to disregard the remedies which the Courts afford, he always retains that other remedy spoken of in all the text books – the remedy by the act of the party himself. So all other persons having the power to protect the assaulted party still retain those powers. Let us apply these principles to this case. Here was a crime against the laws of the United States, committed in part and about further to be continued. Although an application might have been made to a magistrate to bind over the parties threatening the violence, which is the remedy suggested by the learned counsel, did the Marshal cease to have any one of the powers which appertain to his office? Had this legislation of the State to any extent limited and controlled the power which he possessed under the acts of Congress? Was he not still a conservator of the peace, and bound so far as the laws of the United States were concerned to prevent violations of those laws?

Again, is it true that the general Government—this great nation—and its officers are compelled to resort to the State and State tribunals to assist them in the performance of official acts, and to protect them in performing their high duties? The Federal Government is weak, indeed, and its tribunals powerless and dependent creatures, when the great functions of the judicial department of the Government can only be performed through the aid and permission of the several State Governments, and when they must apply to the State tribunals to protect their officers from threatened injuries for performing sacred duties.

Something was said by the learned counsel as to State rights, and as to the history of the writ of *habeas corpus*, which is the great remedy sought here.

So far as State rights are concerned, I am a strong advocate of State *rights*, but I am no advocate of State *wrongs*; and I am equally an advocate of National rights, and of the right of the Federal Government, because, as was said by my colleague who first opened the argument in this case, there is no conflict between these sovereignties. Each has its appropriate sphere of action; each is to be respected and regarded so long as it keeps within its own orbit, and neither has the power or right to transgress the strict boundary line which is prescribed for its own duties.

As was also well said by my colleague, it is a question as to what are State *duties and powers* rather than what are State *rights*.

It is supposed that we have done something here quite offensive to the majesty of the State of California, because by this writ of *habeas corpus* we have caused to be produced here the body of the United States Deputy Marshal, and asked an examination before this tribunal of the circumstances of his arrest and the nature of the acts charged as a crime against State law. The writ of *habeas corpus* is a writ of right, and it was your Honors' duty, on the *prima facie* showing made, to cause the petitioner to be brought here. The question now is, not how he came to be brought here, but what disposition shall be made of him after a full hearing and consideration of the case?

The writ of *habeas corpus* is of immemorial antiquity. Some historians trace something like it among the Romans. Others claim it to have existed in England prior to the time of Magna Charta and refer it to the period of Roman invasion. In England and America it has always occupied a very high position and been very frequently the subject of legislative and constitutional provision. With all free governments it has been an especial favorite and has had the strongest

guards thrown around it. It is probably nowhere better described than by Ch. J. Chase in the case entitled *Ex parte Yerger*, 8 Wall., 85, where he, speaking for the Supreme Court of the United States, says:

"The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defense of personal freedom. In England, after a long struggle, it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, (3 Brit. Stat. at Large, 397; 3 Hallam's Constitutional History, 19,) 'for the better securing of the liberty of the subject', which, as Blackstone says, 'is frequently considered as another Magna Charta. (3 Commentary, 135.) It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors. Naturally, therefore, when the confederated colonies became united States, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words: 'The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.'"

It is to be noticed here that there is no grant any where in the Constitution of the United States of the power to issue the writ of habeas corpus, There is no grant in many of the State constitutions. Though there may be provisions relating to the writ, it is recognized as an inherent right in the people, antedating constitutions. The Constitution of the United States treats it as an existing privilege, and provides that it shall not be suspended except in cases of rebellion or invasion where the public safety may require it. Similar language may be found in the Constitution of California, and in most of the States of the Union.

The old Judiciary Act of Congress of 1789 (1st Stat. at Large, 82), gave the power to issue such writs to

the Courts of the United States in very general terms. It, however, contained the proviso:

"That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless they are in custody, under or by colour of the authority of the United States, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify."

In connection with the matter now before the Court, much has been said relative to State rights and the usurpations by the Federal Government and Courts of powers belonging exclusively to the State Government. In fact, the appearance here of the Hon. Attorney-General of the State is with a view to protect the State against any encroachment of the Federal Court.

A brief history of the legislation upon the writ of *habeas corpus* and the causes which led to this legislation by Congress, may be useful to dispel the false notions which have prevailed concerning the same, as well as to thoroughly illustrate and show the scope and grasp of the present law of Congress covering all *habeas corpus* cases, and will aid the Court in arriving at a rightful construction of the Acts of Congress referred to.

As early as 1803, the great State of Pennsylvania undertook with all her power to resist a decree of the District Court of the United States in a contest growing out of a seizure of a certain British sloop during the Revolution. The Legislature of Pennsylvania declared the decree void and that the jurisdiction of the Court was usurped and a violation of "the just rights of the State" of Pennsylvania. Great excitement prevailed. The Governor issued orders to Gen. Bright, commanding the militia, and directed him to resist the process of the Court. But the process of the U. S. Court was not only executed, but Gen. Bright

and others were indicted, convicted and sentenced for resisting the process of the Federal tribunal.

The cases referred to are: *U. S.* vs. *Peters*, 5 Cranch, U. S., 115, familiarly called the "Olmstead case;" *U. S.* vs. *Bright*, Brightley's Rep., 9; S. C., Bright's Trial, p. 191; 1 Forum, by David Paul Brown, p. 374 *et seq.*

Yet the State of Pennsylvania has since then flourished and retained all her actual State rights, and the great line which divides State and Federal power was not obliterated. The powers of the State of Pennsylvania were not impaired nor her rights infringed. They were only more clearly ascertained.

In 1832-3, the State of South Carolina, assuming extraordinary State rights, considered it within her powers to nullify certain Acts of Congress. Her assumed right to do this was very boldly asserted and a dissolution of the Union threatened. But when the distinguished patriot and hero, Gen. Jackson, then President of the United States, announced, "By the Eternal! the Union must and shall be preserved," the U. S. laws were not only enforced fully, but the Judiciary Act being found inadequate to the exigency, Congress passed the Act of March 2d, 1833 (4 Stat. at Large, 634), enlarging the power of the Courts over writs of *habeas corpus*, thus efficiently aiding the United States officers to execute the Federal laws, and overcoming the Nullification Acts of South Carolina, and all similar Acts.

Still the great lines between the Federal and State government remained as clearly defined as ever, and the pretended impending consolidation or centralization did not take place.

The Acts of Congress referred to, merely provided more ample means by which the Federal Government could effectually enforce its own undoubted powers,

and execute its own laws. It called to its aid the judicial power of the Government and provided protection to its own officers whilst in performance of duties enjoined on them by the Constitution and laws of the United States. It prevented officers of the United States from being arrested, tried and punished by the State authorities for any acts by them done pursuant to the laws of the United States. No one nowadays questions the constitutionality of the Act of 1833, or the utter unconstitutionality of the Nullification Acts of South Carolina.

From the year 1837, down to and including 1841, certain historical events took place which produced a further amendment of the Habeas Corpus Act of the United States, and again enlarged the judicial power of the Courts and Judges of the United States in the matter of writs of *habeas corpus*.

In December, 1837, two or three hundred men in the State of New York made an invasion upon Canada for the purpose of effecting a revolution there. This was repelled by the British authorities and resulted in their following some of the invading force within the limits of the State of New York, and there an American was killed, and the American steamer Caroline burned. Alexander McLeod was one of the British force engaged in the destruction of the Caroline, whose commander was killed. He was arrested by the authorities of New York, indicted for murder and brought to trial. All the acts relating to the destruction of the boat and the killing of the commander were approved and adopted by the Government of Great Britain as a justifiable and necessary act of self-defense in repelling the invasion. A correspondence arose between the United States and Great Britain relating to the same. Great Britain demanded reparation and also the restoration of McLeod.

The New York authorities insisted, as a matter of State rights, that they had power to take and try McLeod for the murder, notwithstanding the avowal of the act by the British authorities.

Mr. Webster, then Secretary of State, announced as his opinion that, after such approval of the individual acts by the British Government, "individuals ought not, by the principles of public law and the general usage of civilized States, be holden personally responsible, in the ordinary tribunals of law, for their participation in it."

This seems to be the settled opinion of the most eminent authorities on the subject.

See: Halleck's International Law, c. 14, Secs. 21–23; 1st Op. Att'y-Gen. U. S., 81; *Carrington* vs. *Ins. Co.*, 8 Pet., 522; Tallmadge's Review, 26 Wend., 674; Bishop Cr. Law., Sec. 132.

The New York officials, however, insisted upon their right to hold McLeod subject to the determination of their tribunals.

See 1 Hill, 377; 25 Wend., 483.

It is now well understood that the trial of McLeod, which took place in the State Court, was a mere form and he was acquitted by previous understanding. It is clear, however, that, had he not been acquitted, an immediate declaration of war against the United States would have been made by Great Britain. Congress, however, to avoid a similar controversy and complication, passed the Act of 1842 (5 Stat. at Large, 539), which provided for an extension of the jurisdiction of the Courts of the United States, in the granting of writs of *habeas corpus* to cases in which any prisoner should be held on criminal charges against him, "for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the

commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

Should the State of New York have another McLeod case, a writ of *habeas corpus* would immediately be granted to remove the prisoner from the custody of the State Courts, and he would be discharged, under the Act of Congress just referred to.

Now if the right to try McLeod was one of the reserved rights of the State of New York, not granted or ceded away by the compact of the Federal Union, that right could not be taken away by an Act of Congress, and the cry could be raised against such an Act as an infringement of sacred State rights. But in point of fact, the Act of Congress was passed merely in confirmation of the views and opinion of Mr. Webster and other distinguished authorities, and was no invasion of any State right whatever. The validity of this Act of Congress has never been questioned by anybody.

The rights of the State of New York remained unimpaired, but they were more clearly defined. Each Sovereignty, the State and the Federal Government respectively, performs its own duties and exercises its own power within its proper limits; the line which separates the powers of the Federal Government from the State Government has not been broken down, but remains as it always existed. It has only been more accurately ascertained and established.

FUGITIVE SLAVE ACTS.

The next attempted usurpation of power by the States upon the Federal power, was in relation to the Fugitive Slave Law.

Prior to the year 1858, a great difference of opinion had existed in the United States as to whether concurrent jurisdiction did not exist in the State courts with

the United States courts to issue writs of *habeas corpus* in cases of imprisonment or detention under the authority of the United States. A number of the State courts had contended that as a matter of State rights such jurisdiction existed in the State courts. In fact, it has been said that the weight of authority until 1858, " was most unquestionably in favor of the concurrent jurisdiction of the State courts." Church on Hab. Cor., Sec. 49; *In re Ferrand*, 1 Abbott, 140; S. C., 29 Myer's Fed. Dec., p. 690.

During this period of time there was great excitement and public feeling in differents parts of the United States upon the subject of the Fugitive Slave Law, and out of this condition of things several very interesting cases arose, all of which I have not time to refer to; but, among others, the State of Wisconsin undertook, through its courts, to determine the validity, force and effect of the Fugitive Slave Law.

Their courts, on writs of *habeas corpus*, discharged fugitive slaves in custody of United States officers under the authority of the Act of Congress in that behalf enacted.

The Supreme Court of the State of Wisconsin adjudged and determined that the Fugitive Slave Law was invalid, null and void, and discharged on *habeas corpus* a fugitive slave held under that law.

It really undertook upon a summary and collateral proceeding by *habeas corpus*, even to determine the validity of the judgment of the District Court of the United States, and to set aside and annul its judgment and discharge a prisoner who had been tried and found guilty of an offense under the laws of the United States and sentenced to imprisonment. The important questions arising on this state of facts were presented to the Supreme Court of the United States and decided at the December term, 1858, in the cases of *Ableman* vs.

Booth and *United States* vs. *Booth*, 21 How., 506. Ch. J. Taney delivered an elaborate opinion, fully and completely settling the question for all time, and ending the controversy denying the jurisdiction of the State Court in such cases.

The whole question of the rights of the State and the rights of the United States are very fully and completely discussed by Ch. J. Taney, and determined without a dissenting voice in the Supreme Court of the United States. The ruinous consequences of the jurisdiction claimed by the Wisconsin courts, and their alleged State's rights, are fully and clearly shown by the Chief Justice. All such pretences are fully overthrown, and the question was settled for all time and in all courts, State and Federal.

I can, of course, on this occasion but call the attention of the Court to this able decision of the Chief Justice and the several points adjudicated, and read but a small portion of it. He says (p. 516):

"Questions of this kind must always depend upon the Constitution and laws of the United States, and not of a State. The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; *and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without any interruption from a State or from State authorities.* And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts

of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals."

The Chief Justice then proceeds to quote the Constitution of the United States, to show that the Constitution and the laws, passed in pursuance thereof, are the supreme law of the land, and says:

"But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, *equally paramount in authority* to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. * * * It was essential, therefore, to its very existence as a *Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws* and treaties of the United States, whether in a State Court or a Court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy, (which is but another name for independence,) so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority."

The distinguished Chief Justice proceeds to show the conflict that would occur between the Courts of the State and the Courts of the United States upon any other view of these subjects, and that without the power in the Federal Courts to ultimately determine upon the validity and force of the Federal laws, con-

troversies could only be settled by force of arms. The Supreme Court of the United States held, in that case, that the law which the Supreme Court of Wisconsin had declared invalid, and which it refused to have executed within its borders, was valid and binding upon the citizens and Courts of Wisconsin.

Notwitstanding the great State of Wisconsin lost what she claimed to be a reserved portion of her State rights, the country has pursued its onward career of prosperity and success, and the State moves on in its proper orbit without interfering at all with the rights and powers of the Federal Government, exercised within its legitimate scope.

See, also, *Tarble's Case*, 13 Wall., 397; *Freeman* vs. *Howe*, 24 How., 459.

THE LATE CIVIL WAR.

Next in the order of history came the Civil War, in which the seceding States asserted the right, as a reserved right of the States, to secede from the American Union.

That question was settled, after many a bloody field of battle, by the surrender of the Confederate forces at Appomattox.

This resulted again—and is worthy of mention here—in a further extension and enlargement of the judicial power of the Courts of the United States, and led to the Act of Congress of February 5th, 1867, upon the subject of *habeas corpus*, and other acts *in pari materia*.

This was especially intended to protect the officers, who were in execution of the laws of the United States, from imprisonment by State authority for obedience to the laws of the United States.

These several Acts, representing the growth and gradual extension of the jurisdiction of the Federal courts to issue writs of *habeas corpus*, will all be found

embodied now in the Revised Statutes of the United States, Sections 751 to 766.

Section 753 reads as follows:

"Sec. 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

No one now contends that the authority, by these sections of the Revised Statutes vested in the Federal Courts, is an encroachment upon the rights of the States, or is not perfectly constitutional and valid.

This jurisdiction has been exercised upon numerous occasions by almost every Circuit and District Court in the United States and by the Supreme Court of the United States itself. The highest tribunals of the States have also recognized the power and jurisdiction exercised by the Federal Courts under the Acts of Congress to which we have alluded.

In the case of *Ex parte Yerger*, 8 Wall., U. S. R., 85, Ch. J. Chase, speaking for the Court, refers to these several Acts of Congress, and shows "*how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the Courts and Judges of the United States;*" and says that this tendency has been constant and uniform.

This was no violation of the spirit of constitutional government, but "the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the Courts and Judges of the United States," and that this tendency has been constant and uniform.

In *Ex parte Bridges*, 2 Woods, 428, Mr. Justice Bradley, after referring to the statutes of the United States upon the subject of writs of *habeas corpus*, says they are all condensed in Section 753 of the Revised Statutes, and adds:

"They have had the effect greatly to enlarge the jurisdiction by *habeas corpus* in the courts of the United States since the first enactment on the subject in 1789. They have removed all impediment to its use which formerly existed where the prisoner was committed under state authority, provided his imprisonment is contrary to the United States Constitution or laws."

This decision of Mr. Justice Bradley is commented upon and approved by Mr. Justice Sawyer, who quotes the extract above given with his approval in *In re Wong Yung Quy*, 6 Sawyer, 237.

In *Ex parte McCardle*, 6 Wall., U. S. R., 325, Ch. J. Chase, speaking for the United States Court in reference to the legislation by Congress on the subject of writs of *habeas corpus*, says:

"This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every Court and of every Judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."

In a very able opinion delivered by Mr. Justice Ballard in the Circuit Court of Kentucky, reported in 2 Abbott, 265, *ex rel. Roberts* vs. *Jailer of Fayette County* (S. C., 29 Myer's Fed. Dec., 684), the Court says:

"By a long course of judicial decisions it may now be considered as settled that this Act (referring to the *habeas corpus* Act of 1833,) gives relief to one in State custody, not only when he is held under a law of the State which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the State which applies to all persons equally, where it appears he is *justified* for the act done, because it was 'done in pursuance of a law of the United States, or of a process of a Court or Judge of the same.' *Ex parte Jenkins*, before Mr. Justice Grier, 2 Wall. Jr. C. C., 521; *Ex parte Jenkins*, before Judge Kane, Id., 539; U. S. *Ex rel. Garland* vs. *Morris*, 2 Am. L. Reg., 348; *Ex parte Robinson*, before Mr. Justice McLean, 6 McLean, 306; *Ex parte Marshall*, 5 Id., 659; *Ex parte Trotter*, decided by this Court in 1862. The decisions in the Courts of the United States are absolutely uniform on this subject, and I find no opposing opinion of any Court except a single one rendered by the Supreme Court of Pennsylvania (*Thomas* vs. *Crossin*, 3 Am. L. Reg., 207). But surely it cannot be expected that I should attach much importance to, much less follow, a single decision of a State Court, opposed as it is to numerous decisions in the Courts of the United States, some of them rendered by Justices of the Supreme Court."

The case of *Ex parte Jenkins*, 2 Wall., Jr., U. S. R., 541, is very important, as the same prisoner was arrested three different times by the State authorities, and each time released upon writ of *habeas corpus;* the first opinion having been rendered by Mr. Justice Grier of the Supreme Court of the United States, and the others by Mr. Justice Kane of the District Court of the United States for the District of Pennsylvania.

In that case (p. 541), in construing the Act of March 3rd, 1833, embodied in Sec. 753 of the present Revised Statutes, the Court says:

"The phraseology of the Statute is unequivocal in its import, and entirely consonant with its apparent

object. It applies in broad and general terms to all officers of the United States, by whatever law or authority confined—with only this limitation, that the confinement must be for an act done or omitted in pursuance of a law of the United States, or in obedience to process of the Federal Courts. *This limitation presents the only question on which I have to pass. I am not called upon to inquire by what form of process the relators are held, by whom it was solicited or authorized, or issued or executed; but whether our officers are or are not imprisoned for acts done by them in pursuance of law or process.*"

There the prisoner was discharged by the Federal Court, although he had been arrested upon a bench warrant based upon an indictment found by the Grand Jury of Luzerne County in the State of Pennsylvania. The ground of the discharge was that he was an officer of the United States, and had been imprisoned by the State authorities for an act done by him in pursuance of a law of the United States.

Mr. Justice Grier in his opinion (p. 529), says:

"The authority conferred on the Judges of the United States by this Act of Congress, gives them all the power that any other Court could exercise under the writ of *habeas corpus*, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned 'by any authority,' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed."

We may say here, as was said by Mr. Justice Leavitt in *Ex parte Robinson*, 1 Bond, 39 (29 Myer's Fed. Dec., 663):

"The only inquiry, therefore, arising in the present case is whether, from the facts proved, it sufficiently appears that the imprisonment of the Marshal was 'for any act done or omitted to be done in pursuance of a law of the United States.' If this inquiry is answered affirmatively it will follow that he is entitled to his

discharge, as the precise case contemplated by the Statute in that event is presented. * * * Now, if the Marshal in good faith, and acting under what he regarded as an imperative obligation resting on him by virtue of a law of the United States, did or omitted to do the acts for which he is imprisoned, * * * is he not entitled to be discharged from imprisonment under the express provision of the Act of Congress before referred to?"

In the Matter of the Petition of H. B. Titus for a writ of habeas corpus, 8 Benedict, 417, the Court held that Section 753 of the Revised Statutes "plainly is intended to afford to all persons arrested for acts done in discharge of obligations to the United States and arising under the Constitution and laws thereof, a summary method of obtaining release from unjust imprisonment."

The consequence of an interference by the State Courts, with officers of the United States who are pursuing their duties under the laws of the United States are fully set forth by the Court in the case of *Ex parte Turner, United States Marshal, etc. Habeas Corpus*, 3 Woods' Rep., 612, where the Court says:

"If officers of the Courts of the United States can be arrested and imprisoned by process from State Courts, for alleged violation of State law and authority, for acts done or ommitted by them in the execution of the laws of the United States and the orders of her Courts, and there is no remedy, then the Courts of the United States are liable to constant obstruction in the exercise of their jurisdiction and powers, and their usefulness and efficiency, if not their very existence, is imperiled. It is true that the jurisdiction of the United States is limited and statutory, but it is also true, that wherever their jurisdiction attaches it is within the scope of that jurisdiction supreme and paramount. If that jurisdiction is invaded, or if the officers of the Courts are interfered with in the discharge of their duties, the means are not wanting, nor their potentiality

doubtful, to vindicate the just authority of the Court in the administration of the laws of the United States."

We respectfully call the attention of the Court to the language of Mr. Justice Bradley, speaking for the Supreme Court of the United States, in *Ex parte Siebold*, 100 U. S., R., 393.

In some cases it was objected, that a trial of the accused party in the State Court, is a trial by jury, whilst a trial on a writ of *habeas corpus* is without a jury. But it must be remembered, that the right of trial by jury is the right of the accused individual, and not the right of the State. It is the accused party that asks his release on *habeas corpus*, and asks the Court to hear him without a jury. This point was fully met and answered in *ex parte Jenkins*, 2 Wall. Jr., 543, 544.

In *Ex parte Bridges*, 2 Woods, 428 (S. C., 29 Myer's Fed. Dec., 669), Mr. Justice Bradley says:

"Although it may appear unseemly that a prisoner, after conviction in a State Court, should be set at liberty by a single Judge on *habeas corpus*, there seems to be no escape from the law."

HIGHER AND BROADER VIEWS OF GOVERNMENTAL POWERS.

The powers of the Federal Court, and the construction of the Acts of Congress applicable to the case at bar, become clearer and plainer in view of a series of Congressional Acts passed shortly after the late civil war, because of the new condition of things then existing.

This legislation of Congress became necessary to enable the laws to be fully executed in that part of the United States where the laws had been disregarded and the Government defied. It is *in pari materia* with the Acts passed in view of South Carolina's nullification. Though these Acts were caused

by the then condition of affairs, they are general in their language and have repeatedly been held by the Courts to be applicable to the whole people and to prevail in every State, and without limit of time until they are altered or repealed by Congress.

The laws referred to will be found chiefly in the U. S. Revised Statutes, Title XXIV, entitled "Civil Rights," Secs. 1977 and following; and in the Title LXX on "Crimes," Chapter 7, Secs. 5506 and following.

These Acts and others of a kindred nature are intended distinctly to recognize and enforce two propositions:

1st. That the Federal "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (U. S. Con., Art VI, Sec. 1, Sub. 2.)

2d. The absolute necessity of the protection and support by the Government of all Federal officers acting in pursuance of the Constitution and laws of the United States.

The Acts of Congress referred to must not be read too literally, but must be interpreted according to their spirit and intention. They are largely remedial and, the intention of Congress being manifest, the construction should be fair and liberal, with a view to make the laws practical and effectual.

All governments necessarily have certain inherent rights, and none the less of these is the right of self-preservation. We must not always expect to find positively defined in the Constitution and written laws every power which a government of even delegated powers can exercise, or every privilege which it enjoys.

The Federal Government, having a corporate existence by reason of its creation, may, from necessity

and from the very nature of things, and in self-defense, repel all acts of the State governments or officials which affect its existence or interfere with these powers.

I will not attempt to read it, but I call your Honors' attention to the old case of *McCulloch* vs. *State of Maryland*, 4 Wheaton, 317, which has been referred to a hundred times in this Court, but cannot be referred to too often, because the views and language of Chief Justice Marshal make it not only a fountain of clear constitutional law, but a legal classic. There the Court, in examining the powers of a government, not only gave a proper construction to language found in the Constitution, but recognized and announced powers which the government possessed, by reason of its very existence as a corporate body—by reason of its very creation, and the objects and purposes of its existence —something seemingly more than certain implied powers, that is to say, necessary and absolute functions essential to its life and entering into its very fibre and structure. The Court there holds:

"The States have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government."

We find nothing in the Constitution of the United States, or any of the States, either granting or denying the power to tax the instruments of the Government, bonds, papers or any other means employed by the Government. We must look at the nature and effect of such an act. It would destroy the instrumentalities of the Government, and would defeat the ends of Justice, and therefore cannot co-exist with the General Government. It would interfere with the inherent powers of the Federal Government, be inconsistent

therewith, and utterly incompatable with our grand, though complicated system of Federal and State Government.

When the several States of the South claimed the *right of secession*, they necessarily claimed the right to destroy the Union and divide the nation. *We look in vain in the mere written Constitution for specific provisions giving powers to the General Government on this subject.* Some statesmen of very prominent position urged that there was no constitutional power in the Government to resist secession. One distinguished hero and patriot said: "Let the erring sisters go," but a broader statesmanship and a truer view of the powers of the Federal Government, found the great principal of self-protection and self-preservation, not only in the very preamble of the Constitution, but in its whole scope and object.

The preamble of the Federal Constitution itself declares:

"We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity, do hereby ordain and establish this Constitution for the United States of America."

This in itself shows how broad and deep are the foundations of the Federal Government, and how utterly fallacious it was to attempt to justify secession on any construction of the Constitution itself. It was revolution and nothing else, and we might as well attempt to reconcile the revolution of 1776 with the so-called English constitution, as to reconcile secession with the Constitution of the United States.

So, at different times, when the States have attempted to tax the United States bonds, it has been held that

it was not allowable, for it would empower the States to control the financial condition of the Federal Government, and place the general welfare of the nation under the domination of the States instead of the Federal Union. This fell within the principle of *McCulloch* vs. *State of Maryland*, 4 Wheaton, 436:

"That the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

So we say here, the State has no power or authority whatever to interfere with the officers of the United States in the performance of their duties. This results from the supremacy of the General Government and the impotency of the State to cripple the Federal Government by interfering with, much less imprisoning, its executive officers and the instruments of its power for performing acts required of them by the laws of the United States. We refer also to *Weston* vs. *The City Council of Charleston*, 2 Peters, 449, and *People* vs. *Weaver*, 100 U.S. R., 543. It has been held also that the salaries of Federal officers cannot be taxed by the States, as that would enable the States to exercise a power over Federal officers injurious to the freedom and rightful action of the General Government itself.

There are many other similar decisions establishing the proposition that though the Federal Constitution is a grant of powers, yet the nation, when created, has in its very nature and essential attributes the great power of self-preservation and protection, not to be impaired by State action.

I contend, therefore, that the various acts of Congress upon the subject of the protection of Federal officers in the discharge of their duties, are not to be

narrowly or literally construed, but with a broad and comprehensive appreciation of the fact that they go to preserve the vital powers of the nation and to protect the servants of the people in executing the nation's will. In this spirit, and in this alone, should the acts of Congress bearing upon the subject now before the Court, be read and construed.

As to the Action of the Attorney-General of the United States.

The view which we have heretofore presented, if correct, maintains the justification of the Deputy Marshal under the laws of the United States, without regard to the action of the Attorney-General of the United States, and makes the case of the Deputy Marshal clear, independently of such action, as if the Attorney-General had never had his fears aroused and had not required the Marshal to take steps to protect the Justices of the Court in the performance of their duties.

But we contend that the Attorney-General of the United States, as the Head of the Department of Justice, had the authority and power to instruct the United States Marshal to use extra caution and care to prevent any violation of the laws of the United States, by which the Justices of the Courts should be either assailed for the past performance of their duties, or impeded in their future administration of justice.

Independently of all the Statutes upon this subject, there must be an inherent power in the Government itself to justify such action, and this is independent of the inherent power of the Courts themselves.

The whole scheme or plan of the United States system of Courts, is to make such Courts independent tribunals. In the performance of their lawful duties they must possess a self-sustaining power, and doubt-

less have the inherent right of self-defense. Congress in the organization of the Executive Department of the Government, has organized one of the Departments as the Department of Justice. (Revised Stats. U. S., Sec. 158, *et seq.*)

This is undoubtedly intended to act in harmony with the system of courts, and to aid, support and maintain the Courts and Federal tribunals in the performance of their duties, for the executive officers of the courts are placed under the general superintendence and direction of the Attorney-General, by which it is manifest that what the courts shall order and adjudge to be done it is the duty of the Department of Justice to cause to be executed.

Sec. 362 of the Revised Statutes expressly declares that the Attorney-General shall exercise general superintendence and direction over the attorneys and marshals in all the districts of the United States and the Territories, as to the manner of discharging their respective duties, and the several District Attorneys and Marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct.

From this it appears that the Court and the Department of Justice are brought into co-operation and entire harmony, and that it is the duty of the Department of Justice, being executive in its character, to aid and assist in all particulars the judicial action of the Federal Courts.

Reliance need not be had for aid and support on any other courts and tribunals, much less the State courts. To make them dependent upon the State courts for their maintenance and protection, is to destroy the whole idea of an independent government,

and especially one intended in its sphere to be paramount to State courts.

The Executive Department of Justice, then, must have an inherent power, from the very nature of its organization, to co-operate with the courts, to aid and assist them in the transaction of their business and to protect them from assault and injury of every kind.

Having the control, superintendence and direction over the attorneys and marshals of the several courts, by the very letter of the Revised Statutes they may take all necessary and requisite steps to aid and assist the courts as well as to protect them from danger.

It was doubtless in this view of the case that the Attorney-General gave directions to the Marshal of the District of California to protect the Federal Judges. That his fears the Judges would be attacked, the law violated and the administration of justice impeded, were not groundless, and that his action was absolutely necessary for the purpose indicated, is made manifest by subsequent events. His action in the premises was not only necessary and timely but altogether meritorious and worthy of imitation.

It is altogether too narrow and strained a construction of the provisions of the Statute referred to, to say that the power of general superintendence and direction thus conferred is confined merely to the manner of discharging duties specifically defined by law. The executive control of the head of a department over a subordinate executive officer in that department, permits him to prescribe specific duties as well as to direct the manner of the discharge of duties in general.

The reason and object of the law must be considered; and there would be little occasion for an Attorney-General to direct a Marshal at all if he were merely authorized to tell him how he must attend

Court and serve processes. To insert after the word "duties" the words "specifically defined by law," would be to add to the terms of the statute, and would so qualify its evident meaning and object as to practically nullify it.

But Sec. 362 should be construed in connection with Sec. 161, which gives to the head of each department a power to regulate the conduct of its officers. A power to regulate conduct includes a power to give specific directions as to what that conduct shall be.

But the controlling consideration is this: That the Attorney-General has himself authoritatively construed Sec. 362 as empowering him to exercise such directions over the Marshal as to require him, as a peace officer having the general powers of a Sheriff throughout his District in the execution of the Federal laws, to protect against threatened violence the persons of the Federal Judges whilst in the discharge of their duties. This construction is reasonable and just. But it was neither the right nor the duty of the Marshal to question the wisdom or justice of the command of his superior officer as long as he required nothing inconsistent with law, or with the general nature of his official duties as an executive officer of the United States.

It is the sworn duty of the Marshal to execute throughout the District all lawful precepts directed to him and issued under the authority of the United States, and he has power to command all necessary assistance in the execution of his duty. Secs. 782, 787.

The term "precept" though including process from a Court, whether civil or criminal, is a more comprehensive term, importing generally a command in writing; and is defined in that general sense as a law term by Webster and Burrill.

The law clearly contemplates that the Marshal shall be governed by the written direction of the Executive Department of the United States, as well as by that of its Courts of Justice, and so requires him to execute all lawful precepts which come to him under the authority of the United States, without limiting him to such as come to him from United States Courts.

But without regard to the signification of the term "precept," as used in the statute, it is clearly the duty of the Marshal, as a subordinate officer of the Department of Justice, to obey the direction of his superior officer; and he is no more called upon to consider the question whether the direction of the Head of the Department of Justice whose special duty it is to construe the law, is erroneous, than he is called upon to consider the question whether the judgment of the Court whose process he executes is erroneous or correct in law.

Numerous cases are to be found of justification of officers under process, even where there was no jurisdiction, provided it did not appear expressly on the face of the warrant to the Sheriff, etc., that there was no jurisdiction.

Ex parte Thompson, 1 Flippin, 507; 29 Myer's Fed. Dec., 659; and series of cases cited.

The head of a department may give a construction to the law under which he controls the department; and this is *a fortiori* true of the Head of the Department of Justice who occupies a quasi-judicial position, as the legal adviser of all the Executive Departments, and of the President, who is the Chief Executive.

In the case of *Decatur* vs. *Paulding*, 14 Peters, 515, the Supreme Court of the United States upon this subject, says :

"The head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney-General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive in which judgment and discretion were to be exercised. * * * The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion, or judgment."

I will also call your Honors' attention to the opinion of Mr. Caleb Cushing, Attorney-General, 1854, Vol. VI, Opinions of the Attorney-General, 346. In speaking of the heads of departments, he says:

"The head of an executive department must exercise judgment and discretion in construing the Acts of Congress under which he is from time to time required to act."

In another opinion at page 341 he says:

"It is impossible for Congress to foresee, and circumstantially provide for, all the possible future contingencies of executive business, either in respect of the business itself or the manner of conducting it.

"A necessary discretion must exist in the nature of things somewhere as to all such matters. * * *

"The Supreme Court have recognized the existence of such a discretion, as being reposed for numerous contingencies, not only in the President in regard to the business of the departments, but in the heads of the departments themselves, by implication of law or as the executive agents of the President."

The Supreme Court of the United States through Mr. Justice McLean, *U. S.* vs. *Macdaniel*, 7 Pet., 14, says:

"A practical knowledge of the action of any of the great departments of the Government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. * * * There are numberless things which must be done, that neither can be anticipated nor defined, and which are essential to the proper action of the government."

The executive power of the Government of the United States is vested in the President by the Constitution, and it is his duty to see that the laws of the United States are faithfully executed.

United States Constitution, Art. II, Secs. 1 and 2.

The President speaks and acts through the heads of the several executive departments in relation to subjects which appertain to their respective duties.

Wilcox vs. *Jackson*, 13 Pet., 513.
U. S. vs. *Cutter*, 2 Curtis, C. C. Rep., 617.

A direction given by the Attorney-General, which the President and not the Attorney-General is authorized to give to officers in the Department of Justice, must be regarded as a direction given by the President.

The Confiscation Cases (U. S. vs. *Clark)*, 20 Wall., 92.

In the opinion of Mr. Cushing, Vol. VII, Op. Att'y Gen., p. 480, it is said:

"It may be affirmed, as a general proposition, that the determination of all executive questions belongs, in theory and by constitutional right, to the President,

howsoever in practice such determination may, in each or in any case, be intrusted by him to a Head of Department. * * * The law says that whatever the Head of a Department directs officially, he directs impliedly by the President's authority."

See also p. 453.

A direction by the head of a department to its subordinate officers must be deemed the act of the President.

Wilcox vs. *Jackson*, 13 Pet., 513.
U. S. vs. *Cutter*, 2 Curtis, C. C., 617.

The subordinate officers of the Government, as well as the heads of the departments, are subject, as agents, to those commands of the President which the Constitutions and laws give to him, and it is through this instrumentality that executive business may be transacted. The doctrine that the President may direct the heads of departments, but that neither he nor they have authority over the secondary executive officer, is against common sense and contrary to the settled constitutional theory which requires unity of executive action.

Opinion of Caleb Cushing, Att'y-Gen., 1854, Vol. VI, 342.

A subordinate officer of a department cannot question or defy a new regulation of the department because thought by him to be unwise or mistaken.

U. S. vs. *Eliason*, 16 Pet., 302.

That the Marshal is subject to the authority of the United States is plain from a series of authorities. The Attorney-General, Wm. Wirt (Vol. I, Opinions of Attorney-General, page 475), gave an official opinion to the President that he might, in the exercise of his executive authority to protect the public lands from intrusion, direct the Marshal to remove intruders from

lands belonging to the United States. When the Federal Courts and Judges are in danger in the performance of their duties, why may not the President order the Marshal to protect them?

No such duty as that referred to by Mr. Wirt was expressly assigned by law to the Marshal, but here we have an early recognition of the power of the executive authority of the United States to assign specific duties to the Marshal in harmony with the general analogy of the duties imposed upon him by law as an executive officer.

The executive may instruct the Marshal as to his duty in defending himself against the interference of a State Court, and may provide counsel to defend the Marshal upon habeas corpus.

Opinion of Caleb Cushing, 1855, Vol. VII, 482.

In the case of *Lockington* vs. *Smith*, Pet., C. C. Rep., 466, an action of assault and battery was brought against the District Marshal, who justified under an order of the President of the United States, requiring him to arrest certain aliens under the Act of Congress relative to alien enemies.

It was contended that the Marshal was not subject to the direction of the President, and was not justified in arresting and confining the plaintiff without the sanction of judicial authority. The Court held that the President, being authorized by law to confine or remove alien enemies, could use any proper means of enforcing his orders and could, with propriety, directly require the Marshals of the several Districts to make the arrest, without the aid of judicial authority; and that the authority of the Marshal to carry into execution the regulations and orders of the President, is implied in the power conferred on the President to make such regulations.

The Marshal of a United States Court, being a subordinate executive officer, must be necessarily subject to the control of the chief executive officer of the nation. There can be no doubt that under the grant of Executive Power to the President of the United States, he would have authority or discretion to direct a Marshal of a District to provide a body-guard for a Justice of the Supreme Court, while traveling from one Circuit Court to another in the performance of his duties, if such body-guard should be deemed by the President necessary to protect the Justice in the execution of those duties enjoined on him by law, as against justly apprehended violence. If the President as Chief Executive should officially give such directions to a Marshal over his official signature, it would clearly protect the Marshal as a command given under authority of the United States.

But if the President could give such direction as Executive Officer of the nation, the direction issued by the Attorney-General to a Marshal under the general control of his Department, was in effect and in legal contemplation, the direction of the President as the Chief Executive of the United States, as much as if he had officially signed it; and the act of the Deputy Marshal under and in pursuance of that direction must be considered as the act of the Executive Power of the Government of the United States.

Suppose the Judges in passing from District to District in the performance of their duties were compelled to pass through the mountains, infested with banditti, could not the President order an escort of troops to protect the Judges? If so, why not protect them from any similar danger though a lesser one? It is not the degree of danger which gives the power to protect, it is the fact of danger. When any danger exists, may not the Marshal and his deputies be ordered to call

up the *posse comitatus* to protect the Courts and Judges? If a portion of a State were in a state of insurrection, may not the President send a body-guard to protect Judges therein whilst performing their duties? It is a weak and effete government, indeed, that must stop its vital operations for want of power to protect officials in the discharge of their duties. The whole frame-work of the laws of the United States is based on the theory and practice of such an existing power.

I have been informed by a late Judge of the Territory of Arizona, that he, himself, in the performance of his duty as a Judge of the District Court of the United States, had been compelled to call for an escort, and that General Schofield placed at his command troops to enable him to perform his judicial duties in passing through portions of Arizona, where all travel was considered dangerous.

It is curious enough that Macauley in his history of England (page 223, Vol. 1), speaking of that part of England beyond the river Trent, as late as the accession of George the III, says: "The Judges on circuit with the whole body of barristers, attorneys, clerks and serving-men, rode on horseback from Newcastle to Carlisle, armed and escorted by a strong guard under the command of the sheriffs."

That was on account of the then wild condition of that part of England. (See also Dalton on Sheriffs, Chap. 68.)

Mr. Bouvier, in the Second Volume of his Dictionary on the subject of Sheriffs, maintains the proposition so forcibly urged by my colleague (Judge Mesick) in showing that the sheriffs are the executive arms and representatives in their counties of the great executive head of the government, just as we claim that the Marshal here is the executive arm of the Federal Government for this particular District.

I call attention again to the Revised Statutes of the United States, Sections 1980 to 1990.

On account of the condition of things in the Southern States, just after the close of the civil war, the President was expressly authorized, where he believed that in any part of the country there were threats of intimidation towards the Judges, or interference with the Courts, or the commission of other crimes against officers of the United States, to order the Judge, Marshal and District Attorney to proceed at once to the seat of the expected crimes, and there summarily arrest the party about to commit them, and try him there upon the spot. So the President may send the land and naval forces of the United States to any place where he deems it necessary to prevent the violation of the Civil Rights Act.

To say that a vast power like that does not include the power of directing a United States Marshal to accompany a Judge, and protect him from injury and threatened death whilst in the performance of his judicial duties, seems to pass out of the limits of ratiocination, and into the absurd and foolish.

The Crimes Act and the Civil Rights Act refer to all these things. The Civil Rights Act not only protects against combinations to interfere with the discharge of duties by the officer, but it makes the parties committing the offense civilly responsible for all the results which may happen from any intimidation or interference with any officer of the Government. The Crimes Act operates in consistency with that, and makes them criminally responsible for the same thing.

Sections 1980 and 1988 will be found instructive to your Honors, if it is necessary to go further and show the powers of the Government and of the public officials upon this subject.

We contend, then, if your Honors please, that Deputy Marshal Neagle was justified in the act of homicide with which he has been charged, under all the circumstances, and that it was pursuant to law:

1st. By reason of the powers expressly given him by the Acts of Congress.

2d. Because of the inherent power and duty vested and imposed on him to protect the Court and its members.

3d. Because and by virtue of the orders and directions of the Marshal who, himself, acted under the instructions of the Attorney-General of the United States, with the sanction and approval of the President.

I will close with a few propositions, which I claim to be conclusive of the case in its present aspect.

1. No act done by an officer of the United States, in pursuance of the laws of the United States, can be an offense against the State of California.

2. No State court has power or jurisdiction to punish an officer of the United States for obeying the laws of the United States.

3. All the powers and duties of United States Marshals and deputies arise under the laws of the United States.

4. When a Marshal or Deputy Marshal of a United State Court exercises his lawful powers, or performs his duty, he is acting under and pursuant to the laws of the United States.

5. For the exercise of his lawful powers and the rightful discharge of his duties, and the consequences resulting therefrom, the Marshal and his deputies are not answerable at the bar of the State.

6. The United States courts are the proper tribunals to determine the proper meaning and construction of the laws of the United States, by which the

powers and duties of the Marshal are to be determined.

7. If this Court, then (having juristiction to construe the acts of Congress, and to determine what the powers and duties of the Marshal and deputies are), shall determine that the act for which Deputy Marshal Neagle was held in custody by the Sheriff of San Joaquin County, fell within the powers or duties of a Deputy Marshal, he will be entitled to be discharged on this writ, and no right or jurisdiction of the State will be violated or invaded.

The whole inquiry then comes back, and is narrowed down to two questions:

1st. Was Deputy Marshal Neagle held in custody by the State authorities for the homicide, by him committed, of David S. Terry?

2d. Was that homicide committed by the Deputy Marshal in pursuance of the powers and duties with which he is charged by the laws of the United States?

The facts are that Deputy Marshal Neagle in the performance of duties enjoined on him by the laws of the United States and pursuant to the directions of his superior officer, protected a venerable Justice, a member of the Supreme Court of the United States, the most august body on earth, and saved the life of the Justice as well as his own life; that to effect these objects he was compelled to take the life of the assailant; that in the effort to save life he took every precaution peacefully to prevent the assault, and failing and only in the last extremity, fired the fatal shot. From first to last, he acted under instructions and obeyed them under a sense of official obligation. He stands then here justified in law and reason, and having acted pursuant to the law of the United States, he asks this Honorable Court of the United States to discharge him from the custody of the State officer. The per-

formance of his duty to the United States is no crime against the State. He has committed no crime against any law of earth or Heaven.

Whilst the other side asks that Deputy Marshal Neagle shall be sent off to Stockton for trial in a State Court for an alleged crime against the State, I can only say of him as Macbeth said of Duncan,

> "that his virtues
> Will plead like angels, trumpet-tongued, against
> The deep damnation of his taking off."

Sept. 11th and 12th, 1889.

FEB. 28 1890

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 1472.

THOMAS CUNNINGHAM, SHERIFF OF THE COUNTY OF SAN JOAQUIN, CALIFORNIA,

Appellant,

vs.

DAVID NEAGLE,

Appellee.

BRIEF AND ARGUMENT FOR DAVID NEAGLE, APPELLEE.

JOSEPH H. CHOATE,
JAMES C. CARTER,
Of Counsel.

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM—1889.

THOMAS CUNNINGHAM, Sheriff of the County of San Joaquin, California,
Appellant,
vs.
DAVID NEAGLE,
Appellee.
No. 1,472.

BRIEF FOR DAVID NEAGLE, APPELLEE.

Statement.

This is an appeal (authorized by the Act of March 3, 1885, 23 Stat., p. 437) from the order of the United States Circuit Court for the Northern District of California, discharging the appellee from the custody of the Sheriff of San Joaquin County, California, after full hearing, upon a writ of *habeas corpus.* (Record, p. 113.)

There was no dispute before the Circuit Judge as to the facts. Counsel for the appellee offered no testimony and declined to cross-examine the witnesses produced by the petitioner, and studiously confined his contention to the

single question of jurisdiction. The very careful statement of facts contained in the opinion of Judge SAWYER is fully sustained by the evidence. Thus, upon these undisputed facts, the case presents only a question of law for the consideration of this Court, viz.: whether Neagle, in protecting Mr. Justice FIELD from threatened assassination, which protection necessitated the shooting of Terry (the assassin), was acting under the authority of the United States, whether it was an act done in pursuance of United States law, and whether Neagle's continued detention in custody by the Sheriff, upon the facts ascertained by the Circuit Judge, was in violation of the Constitution and law of the United States?

Certain facts, vital to the consideration of this legal question, must be borne in mind throughout the discussion.

First.

AS TO THE RELATIONS OF NEAGLE TO THE COURT AND JUDGE, AND TO THE EXECUTIVE DEPARTMENT OF THE UNITED STATES GOVERNMENT.

A.

He was a citizen of the United States, owing absolute allegiance and fidelity to the United States as his sovereign, and he was an immediate bystander, and the only bystander in a position to protect, and capable of protecting the Justice from the impending attack.

The Justice who sat by him was incapable, from the position in which he sat, of offering the least resistance or self-defense.

B.

Neagle was a sworn Deputy Marshal of the District of California. As such he was a Federal executive officer, and executive officer of the Court of which Mr. Justice FIELD was the presiding judge; and—

As a Marshall he had, by section 788 of the Revised Statutes, in California--

> " the same powers *in executing the laws of the United States* as the Sheriff and his deputies in that State may have by law in executing the laws thereof."

This makes the Code of California an important fact in the case.

By section 817 of the Penal Code of California, the Sheriff is a " peace officer."

By section 4176 of the Political Code he is "to preserve the peace" and "prevent and suppress breaches of the peace."

The relation of this Code to the common law is settled by the Supreme Court of that State.

Est. of Apple, 66 Cal., 434.

In that case the Court say:

> "The Code establishes the law of this State respecting the subjects to which it relates; but this of course does not mean that there is no law with respect to such subjects except that embodied in the Code. When the Code speaks its provisions are controlling, and they are to be liberally construed with a view to effect its objects and to promote justice, the rule of common law that statutes in derogation thereof are to be strictly construed having been abolished here; but where the code is silent the common law governs."

Thus, if there be such a thing as "the peace of the United States," if it be within the power and the duty of the United States as a sovereign to protect the persons of its judges when proceeding on the circuit in discharge of their official duties, it would seem, by the express letter and the true spirit of the Act of Congress, that Neagle, as Deputy Marshal, had all the power to keep that peace and to extend that protection to the Judge which the Sheriff of the county, attending the Chief Justice of California to his

Court, would, by common law and the State Code, have had to keep the peace of the State and to protect the Chief Justice from assassination.

C.

Neagle was specially deputed by the President, through the Attorney-General, to protect Mr. Justice FIELD from the very attack which befell him, and against this very assassin, and at the very time and place of the attack. So that whatever power, if any, resides in the Executive Department of the government of the United States, in the absence of any special enactment by Congress to that particular end, to protect the persons of the Federal Judges, while in discharge of their judicial duties, from threatened attack, was all vested in Neagle.

The precise relation of the Attorney-General to the matter is here important.

On the 2d of August, 1861, when, by the outbreak of the war and the secession of States, the whole administration of justice in those States by the Courts of the United States had been thrown into confusion, Congress passed the act of that date, now section 362 of the Revised Statutes:

> "The Attorney-General shall exercise *general superintendence and direction over the attorneys and marshals* of all the districts in the United States and the Territories as to the manner of discharging their respective duties, and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings," &c., &c.

And by the Act of February 18, 1875 (ch. 80, p. 318), it was enacted that section 846 of the Revised Statutes be amended by adding thereto this clause:

> "That where the ministerial officers of the United States have or shall incur *extraordinary expenses in executing the laws thereof*, the payment of which is not specially provided for, the President

> of the United States is authorized to allow the payment thereof under the special taxation of the District or Circuit Court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary."

On the 27th of April, 1889, the Attorney-General, having been advised of the threats of violence which had been openly uttered by Mr. and Mrs. Terry against Mr. Justice FIELD, wrote a letter (Rec., p. 344) to the Marshal of California—

> " calling his attention to the propriety of exercising unusual caution, in case further proceedings shall be had in that case, for the protection of his Honor Judge Field, or whoever may be called upon to hear and determine the matter"—

stating also that—

> " *It is due to the dignity and independence of the Court and the character of its Judge that no effort on the part of the Government shall be spared to make them feel entirely safe and free from anxiety in discharge of their high duties.*"

[The Terrys were at this time under several indictments found in the District Court for the violence offered by them in the previous year in the Circuit Court.]

On the 6th of May, 1889, the Marshal having submitted this letter to the District Attorney and consulted him thereon, replied to the Attorney-General (Rec., pp. 344-5), stating that—

> " he has given the matter careful consideration, with the determination to fully protect the Federal Judges at this time, trusting that the Department will reimburse me for all reasonable expenses * * * " You can rest assured that when Justice Field arrives he as well as all the Federal Judges will be protected from insults, and where an order is made it will be executed without fear as to consequences. I shall follow your instructions and act with more

than usual caution. I have already consulted with the United States District Attorney as to the advisability of making application to you at the time the Terrys are tried on the criminal charges *for me to select two or more detectives* to assist in the case, *and also assist me in protecting Justice Field while in my district.*"

On the 7th of May, the District Attorney also wrote to the Attorney-General as follows (Rec., p. 346):

"I write merely to suggest that *there is just reason* in the light of the past and the threats made by Judge and Mrs. Terry against Justice Field and Judge Sawyer *to apprehend personal violence at any moment and at any place, as well in Court as out of Court*, and that while due caution has always been taken by the Marshal when either Judge or Mrs. Terry is about the building in which the Courts are held, *he has not felt it within his authority to guard either Judge Sawyer or Justice Field against harm when away from the Appraiser's building.*

"Discretion dictates, however, that a *protection should be thrown about them at other times and places* when proceedings are had before them in which the Terrys are interested, *and I verily believe, in view of the direful threats made against Justice Field, that he will be in great danger at all times while here.*

"I would therefore suggest *that he be authorized in his discretion to retain one or more deputies at such times as he may deem necessary for the purpose suggested.*"

After receipt of these communications, and on the 27th of May, the Attorney-General, *referring to this correspondence* (Rec., p. 347), expressly directed the Marshal to employ certain special deputies at a *per diem* specified, payable out of the appropriation provided in section 846 of the Revised Statutes as an extraordinary expense, owing to the small number of bailiffs under his control to preserve order.

Under these instructions, Neagle, on the 17th day of June, upon the arrival of Mr. Justice FIELD in California, was

duly appointed and sworn as a deputy marshal (Rec., p. 243).

The Marshal's general instructions to Neagle were to accompany Mr. Justice FIELD, to stay with him constantly, to watch Judge Terry and Mrs. Terry on all occasions, and especially when they should be passing Fresno (a station on the Southern Pacific Railroad, between Los Angeles and San Francisco), where the Terrys resided, and to protect Mr. Justice FIELD from any injuries that Judge Terry and his wife might attempt to inflict upon him.

The Marshal says:

> "I informed him that Judge Terry was not an ordinary man, and especially when he was enraged, and if he should happen to meet Justice Field and made an attempt to assault him, that I did not believe that he could control himself" (Rec.. p. 255).
> "I informed him that I believed that if an opportunity presented itself that Judge Terry would attack Mr. Justice FIELD, and gave him general instructions to protect the Justice at all hazards, and to act quickly; to be constantly on his guard, and that he was to remember that he was not dealing with an ordinary man. I regarded him as a very violent, dangerous man" (Rec., p. 256).
> "I told him that if Terry attempted to assault Justice Field, to inform him that he was an officer and have him stop and cease his attack. I think I also informed him that I believed if he attacked Justice FIELD at all, it would not be simply, as some reported, that he was simply going to insult and slap him, but he would not stop at that; that he could not control himself, judging from his action in the court room," "and that he would draw his knife and would use it" (Rec., p. 257).

On the 12th of August Mr. Justice FIELD was to hold an assigned session of the Court at Los Angeles, and was to return to San Francisco to hold another assigned session there on the 14th.

The Marshal had notice of this, and also had notice that any attack that was to be made would probably be made

on this trip, and he so instructed Neagle, who was ordered to accompany Mr. Justice FIELD (Test. Wm. Mathews, Rec., 258; Neagle, Rec., p. 331).

It was under this authority from the Executive Department of the Government, and these instructions of his superior officer, that Neagle was acting at the time of the homicide.

Second.

THE UNDISPUTED FACTS RELATING TO THE HOMICIDE.

The Terrys had no personal grievance against Mr. Justice FIELD. On the contrary, he and Judge Terry had sat together in the Supreme Court of California as Chief and Associate Judges, and since that time no personal difference had arisen between them, aside from any feeling that may have grown out of the judicial action of Mr. Justice FIELD in the case in which the Terrys were interested.

In September, 1888, in the court room when Mr. Justice FIELD was reading his opinion in the *Sharon Case*, Mr. and Mrs. Terry attended, armed, the one with a knife, and the other with a pistol, and were guilty of the most outrageous violence, Terry especially. He struck the Marshal a violent blow when the latter was proceeding to execute the order of the Court to remove Mrs. Terry from Court. He violently resisted the efforts of half a dozen men to hold him in his seat, and, on leaving the court room, drew his knife and threatened and attempted to cut his way through a group of officers, to get into the Marshal's room where his wife then was.

Being imprisoned by the order of Mr. Justice FIELD for this flagrant contempt, and confined in jail in Alameda County, they both commenced a systematic series of threats against the person and life of Mr. Justice FIELD, and continued the same incessantly down to the day of the homicide.

> " Mrs. Terry repeated a number of times that she would kill both Judge Field and Judge Sawyer

while we were removing her, and while she was in the court room, and also while passing over on the boat to Alameda" (Rec., p. 177).

"Her husband was present and said nothing." "Terry said that he was not through with Judge Field yet" (Rec., p. 198).

In the jail at Alameda—

"Terry said that after he got out of jail he would horsewhip Judge Field; that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him. I told him it would be a dangerous thing to do; that Judge Field would resent it. He said: 'If he resents it I will kill him'" (Rec., p. 202).

In the jail—

"Mrs. Terry showed me the sheath of the Judge's knife. The Judge was there, and he laughed and said, 'Yes, I always carry that.' The Judge made the remark, talking about the marshals and judges, that they were a lot of cowardly curs, and he would see some of them in their graves yet" (Rec. p. 204).

"Mrs. Terry made a statement that she expected to kill Judge Field some day" (Rec. p. 205).

Within two months of the homicide—

"Mrs. Terry held her little satchel, which she had in her hand, and tapping it, she said to this effect: 'If he [Mr. Justice Field] don't look out, I have something there that will fix him'" (Rec., p. 210).

Terry had a conversation with the witness Williams (Rec., p. 213), the purport of which was that he felt he had some grievance against Mr. Justice FIELD; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and get him into a fight; that Mr. Justico FIELD wouldn't dare to come out to the Pacific coast; and he said he would have a settlement with him when he did meet him.

After Mr. Justice FIELD's return to California in 1889, Terry, to the same witness, stated that he had a most bitter and malignant feeling towards him. He certainly hated him, and was not averse to having anybody know it; in fact, he rather desired that it should be known (Rec., p. 214).

> "He mentioned several times that he would have a meeting later with Judge Field, and it would not be a pleasant one for Judge Field."

When being conveyed by the Marshal in a carriage, Mrs. Terry said to the Marshal:—

> "I could have killed old Field or Sawyer. I could shoot down either one of them, and you could not find a jury in this city or State that would convict me."

She repeated it again, and Judge Terry assented to it, and said—

> "No, you could not find a jury that would convict any one for killing Justice Field."

So open and notorious were these threats that reports of them, as has been seen, reached the Executive Department at Washington; and the newspapers of California, from the time of the arrival of Mr. Justice FIELD, teemed constantly with articles on the subject, evidencing a general public expectation of an assault upon the Justice.

Terry was a notoriously desperate ruffian. In the early days of California he had been ordered out of the State by the Vigilance Committee. He resigned his place as Chief Justice of the Supreme Court, to fight the duel in which he slew Senator Broderick. It was his common boast that he always went armed with a knife. He was habitually violent, implacable, and dangerous, where he thought he had any cause of offense, and had the general reputation of making no idle threats—of carrying out whatever violence he threatened. He was renowned for his violent and vindictive temper. He was a man of gigantic stature—

six feet and three or four inches tall—and weighed some two hundred and fifty pounds, while Neagle weighed a hundred pounds less, and was six or seven inches shorter.

As Mr. Justice FIELD and Neagle were returning on the train from Los Angeles to San Francisco, Terry and his wife got on the cars at Fresno, and Neagle was immediately so informed. Learning from the conductor that there was a State constable stationed at Lathrop, where the train was to stop for breakfast, Neagle got him to telegraph to this constable, asking him to be on hand on the arrival of the train. When the train stopped, Neagle proposed to Mr. Justice FIELD to take his breakfast in the car, fearing a meeting with the Terrys if they got off, but Mr. Justice FIELD decided to go into the station as usual.

They had already taken their places at the table when Terry and Mrs. Terry entered the room. As soon as they got opposite and saw Mr. Justice FIELD, Mrs. Terry immediately started back for the car (as afterward appeared, to get her pistol). Terry continued on and took a seat at a neighboring table. After a little, and while Mr. Justice FIELD was seated eating his breakfast, and did not observe him, Terry stole behind him, and dealt him one violent blow on the right side of his head and another on the left. Neagle, who had been carefully watching him, stood up, exclaiming, "Stop, sir; stop, sir; I am an officer," but Terry, instead of desisting, made a quick motion as if to draw his knife, with all the rage of his nature concentrated in his countenance, whereupon Neagle, believing there was no other way to save Mr. Justice FIELD, discharged his pistol at Terry, with fatal effect.

Third.

AS TO THE SUBSEQUENT ARREST OF THE PETITIONER, HIS PETITION TO THE UNITED STATES CIRCUIT COURT FOR A WRIT OF *habeas corpus*, AND THE PROCEEDINGS THEREUPON.

The State Constable, who had been telegraphed for, did not appear upon the scene until after Mr. Justice FIELD

and Neagle had returned to the train, when he arrested the latter for the homicide.

On the same day, August 14th, Mrs. Terry appeared before a Justice of the Peace at Stockton and made oath that Terry had been willfully murdered by Stephen J. Field and David Neagle, whereupon the Justice issued his warrant for the arrest of both.

Both Mr. Justice FIELD and Neagle were taken into custody by the Sheriff, under the warrant—Neagle at Stockton, and Mr. Justice FIELD afterwards, at San Francisco. "Subsequently," as stated in the opinion of Judge SAWYER (Rec., p. 84)—

> "after the arrest of Justice FIELD, and after his being released by the United States Circuit Court on *habeas corpus* upon his own recognizance, the proceeding against him before the Justice of the Peace was dismissed, the Governor of the State having written a letter to the Attorney-General of the State, declaring that the proceeding, if persisted in, would be a burning disgrace to the State, and the Attorney-General having advised the District Attorney of San Joaquin County to dismiss it."

On the 16th of August Neagle, by A. L. Farish, another deputy, on his behalf, presented to Judge SAWYER a petition for a writ of *habeas corpus* (Rec., p. 1), alleging that—

> "he was in custody in violation of the Constitution and laws of the United States for an act done in pursuance of a law of the United States, and for an act done while in the discharge of his official duties under the direction of his superior officer, to wit, the Marshal for the Northern District of California, and under the direction of the Attorney-General of the United States, and while protecting and shielding the Honorable Stephen J. Field, Associate Justice of the United States Supreme Court, from threatened personal assault, injury and violence at the hands of said David S. Terry, and while said Stephen J. Field was in the discharge of his duties as Associate Justice of the Supreme Court of the United States, under the laws of the United States."

The petition then set forth the facts substantially as stated in the opinion Judge SAWYER.

On August 17th, the Sheriff produced Neagle before Judge SAWYER, and made return (Rec., p. 8) that he held him in custody under the warrant and the commitment endorsed thereon and signed by the Justice on the 15th, committing him for examination to the Sheriff's custody.

On August 22d, the Sheriff filed and served his demurrer to the petition on which the writ was issued, assigning as grounds for demurrer: (1) That the petition did not state facts sufficient to give the Court jurisdiction to grant the writ, or to authorize the Court to grant any of the relief prayed for; (2) that it appeared upon the face of the petition that Neagle was in custody of the Sheriff under a warrant and commitment duly issued upon a charge of murder, and that it did not appear that he was in custody for any act done or omitted in pursuance of any law of the United States, or of any order or process or decree of any court or judge thereof, or in violation of the Constitution or any law of the United States; (3) the same thing repeated in different words (Rec., p. 9).

On the same day, August 22d, Neagle filed his "answer or traverse" to the return of the Sheriff, setting up, with greater particularity and detail, the facts set forth in his petition, as well as all the proceedings had in the Terry contempt matter (Rec., pp. 10–40).

On August 23d, the Sheriff demurred to this traverse on the same grounds, stated in substantially the same language, as those set forth in his demurrer to the petition.

On August 22d, a single witness, Lidgerwood, was, by stipulation and order, examined *de bene esse*, and counsel for the Sheriff cross-examined (Rec., pp. 114–155).

On September 3d (Rec., p. 156), the parties appeared in Court before Judge SAWYER to proceed with the hearing. The Attorney-General of the State and Messrs. Langhorne and Miller appeared for the State.

The Attorney-General of the State (Rec., p. 158), stated, in substance, that he appeared for the State to argue only the question of jurisdiction, which seemed to be suffici-

ently raised by the demurrer to the traverse. And it was then substantially agreed that the evidence which the petitioner had to offer should first be taken and the question of jurisdiction argued afterwards. The Attorney-General also announced that he did not feel at liberty to set aside the course of procedure that his associates had outlined; that they had said that they would not introduce any testimony or cross-examine any witness, and, therefore, he adopted that course of procedure, saying that he regarded the jurisdiction question as paramount, and desired to present it to the Court and to the Supreme Court of the United States.

The Court then announced (Rec., p. 159), that it would be ready to hear the argument in the case as soon as the testimony was taken; that the question on the demurrer could just as well be argued then as now; and that, if there were any additional light thrown on the case by the testimony, it would be better, as the case would go to the Supreme Court of the United States and he wanted a full investigation.

The Attorney-General then withdrew with his associates, stating (Rec., p. 159) that he did not propose to take any part in the taking of testimony.

Thereupon, on that and succeeding days, to and including September 7th, the counsel for the petitioner introduced the testimony appearing from page 159 to page 343 of Record, with the exhibits extending to page 582.

On Monday, the 9th, to which the hearing had been adjourned on the 7th, the petitioner obtained leave from the Court to amend the answer to the Sheriff's return, so as to make it conform to the proofs taken.

On the same day, the 9th, the amended answer was subscribed and sworn to (Rec., p. 46).

On the 10th, the Attorney-General, appearing as attorney for the Sheriff, filed and served a demurrer to the amended answer, on the same grounds, stated in substantially the same language, as those contained in the two previous demurrers.

Thereafter, and on the same day, the Attorney-General,

as counsel for the Sheriff, moved to quash the writ of *habeas corpus*, on the ground that the petition on which it was granted was not signed by Neagle in person, but by Farish on his behalf, which motion was denied, and the respondent excepted (Rec., p. 75).

The Attorney-General, as counsel for the Sheriff, next moved to strike out the amended answer, upon the ground "that the same was made and filed after the hearing and taking of testimony herein by the Court," and this motion was denied and the respondent duly excepted. Finally, the Attorney-General, as counsel for the Sheriff, moved to strike out all the testimony, proofs and evidence, taken prior to the filing of the amended answer, on the ground that the Court had no authority to allow the filing of the amended traverse after the taking of testimony, which motion was denied and the respondent excepted. These, which are embodied in the bill of exceptions signed by the Judge (Rec., pp. 73–74), appear to be the only exceptions in the record.

On the 16th of September, the cause having been fully argued in the meantime, the Court, consisting of the Circuit and District Judges (Rec., p. 110), rendered its decision, and on the same day (Rec., p. 74) entered judgment that Neagle was illegally restrained of his liberty, as stated in the petition, and discharging him from custody.

Formal orders denying the several motions of the Attorney-General were entered (Rec., pp. 110, 111).

On the sixteenth, the appeal of the Sheriff was allowed (Rec., p. 113), the record upon such appeal made up, and the Court ordered that—

> "pending such appeal and the final determination thereof by said Supreme Court of the United States, said David Neagle, the petitioner, be discharged upon his own recognizance in the sum of $5,000, in all matters to abide and hold himself to answer the final decision and judgment of the Supreme Court,"—

which recognizance was duly given (Rec., p. 584).

POINTS.

First Point.

There is no merit or force in any of the technical points raised by the Bill of Exceptions.

A.

It is true that section 754 of the Revised Statutes does require the application for the writ to be "signed by the person for whose relief it is intended," and that "the facts set forth in the complaint shall be verified by the oath of the person making the application," and that here the application to the Circuit Court in San Francisco was not signed by Neagle, who was in jail at Stockton, but by Farish on his behalf, who also verified it.

If this was a defect, it was waived by the respondent in making return to the writ and demurring to the traverse, which was signed and verified by Neagle, and again to the amended traverse, which was also so signed and verified, and consenting that the Court might proceed with and conclude the taking of the testimony. It was too late after that for him to move to quash the writ by reason of the complaint not being signed and sworn to by Neagle.

But it was no defect. The requirement of the statute is complied with when the petition is signed by the person for whose relief it is issued, or by some one acting for him in his name and on his behalf. If it had to be signed by the person himself there would be many cases in which no application could be made—as in the cases of infant children, persons of unsound mind, prisoners in the army or navy confined in forts or frigates, to whom access cannot be had, and in whose behalf friends only can apply for the writ. It has been held repeatedly by the Circuit and District Courts of the United States that the require-

ment of the statute is complied with when the person who actually signs it does so on behalf of the applicant.

In re Hoyle, 12 Chic. Legal News, 279.
In re Terrens, 3 Benedict, 445.
And also Hurd on Habeas Corpus (2d Ed.), pp. 202–204.
Ex parte De Roches, 1 McAllister, 66.
In re Wildenhus, 120 U. S., 1.

B.

It is true also that the Court allowed the traverse to the return to be amended after the testimony had been taken, to make it conform to the proofs, but this is expressly allowed by the statute, section 760 of the Revised Statutes, which provides that—

> "*The return and all suggestions made against it may be amended* by leave of the Court before *or after the same are filed, so that thereby the material facts may be ascertained.*"

Second Point.

The true function and office of the writ of habeas corpus provided by the several statutes, amendatory of Section 14 *of the Judiciary Act of* 1789, *and now embodied in section* 753 *of the Revised Statutes, is not confined to what it was at common law, but necessarily devolves the power upon the Federal Court or Judge, in inquiring into the cause of restraint of liberty, to hear and determine the facts and the law which constitute the petitioner's case of justification, by Federal authority, of the act done, or of a violation, by his continued custody, of the Federal Constitution, law or treaty, or of privilege, &c., by the law of nations, and to discharge the petitioner from custody, if such is made out, and to remand him if not.*

Nothing less than this could have been within the intent of Congress, whether we consider the language of the several acts and of the revision, or the public and historical emergencies which gave rise to the enactments.

Each of the successive enactments was a new and enlarged assertion of the national sovereignty of the United States, extending and regulating the judicial power which, by the Constitution, is vested in the Federal Courts, which were thereby enabled to exercise such sovereignty in the cases prescribed.

Each enactment provided for the withdrawal from the State Court of the single Federal question involved, into the Federal Court, and its summary decision there, not upon the return, warrant, and commitment alone, but upon testimony to be taken before the Federal Court, without a jury, which, subject to a review by the Supreme Court, was regarded by Congress as a sufficient guarantee of the public safety and welfare.

Of course, the enactments contemplated interference with the natural and ordinary jurisdiction of the State Court, and with a jury trial there upon whatever charge of crime might there have been made, but upon the theory that, in the one case, the act, of whatever nature, whether assault, trespass or homicide, if done under and pursuant to a law of the United States, was not a crime subject to the municipal law of the State, and, in the other case, that there could be no lawful custody by the State in violation of the Federal Constitution, law or treaty, or of the law of nations.

The 14th section of the Judiciary Act, (1 Stat., 82,) limited the power of Federal Judges to grant the writ, in the case of prisoners in jail, to cases where they were "in custody under or by color of the authority of the United States, or are committed to trial before some Court of the the same, or are necessary to be brought into Court to testify."

How far, under that statute the Federal Courts, could go behind the return, considering that it gave them the power

to grant the writ for the express "purpose of an inquiry into the cause of restraint of liberty," probably never was, and need not now be determined.

Certainly, as the English law then stood, that is, the common law and the Habeas Corpus Act of Chas. II., the judges and courts in England confined themselves very closely to what appeared upon the face of the return, where it had been legal and regular, and the process had been issued by a court of competent jurisdiction. But the writ of *habeas corpus* seems always to have had a more extended use in the United States than in England, and inquiries under it have been more varied and far-reaching here than in that country.

Church on *Habeas Corpus*, §. 221, p. 272.

The act of March 2; 1833, (4 Stat., 632,) besides providing, by its third section, for the removal at any time before trial, from the State Court into the Circuit Court, of any suit or prosecution for any act done under the *revenue* laws of the United States, or for any right, authority or title set up or claimed by such officer under any such law, by its seventh section conferred upon Federal judges, in addition to the authority already conferred by law, power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, "where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof."

This act, like that of 1789, contained no provisions regulating the practice and procedure after the return, but, in view of the national crisis which led to the passage of the act, it can hardly be doubted that the intent of Congress, by this seventh section, was to enable the Federal Judge, if, upon the proofs, he found the fact to be that the petitioner was in custody for an act done in pursuance of a law of the United States, to discharge him; and, to ascertain that fact, he must of necessity resort to any evidence that might be offered material to determine it.

The act of 29th August, 1842, however, with the debates that preceded its passage, and the emergency out of which it arose, sheds the clearest light upon the function and the purpose of the *habeas corpus* provisions, as they were finally carried into the revision.

At the time of the passage of that act the Executive and Judiciary of the State of New York, in the case of *McLeod*, charged with murder in the State Court, had sucessfully refused and resisted the intervention of the Federal Government, attempted upon the ground that, by the law of nations, the act of McLeod, which was charged to have resulted in the homicide, was an act done under the authority of the British nation, and therefore did not subject him individually to trial and punishment therefor by the municipal law of the State where the homicide was committed, and that as the Constitution of the United States committed the whole subject of foreign intercourse to the Federal Government, the British subject, so charged with crime, ought, upon the demand of the Federal Government, to be released from the custody of the State Court.

But, as the statutes stood, the Federal Judges had no power to issue a writ of *habeas corpus* in such a case, and it was to give them that power, and to provide in what cases they should exercise it, that the Act of 1842 (5 Stat., 539), entitled "*An Act to provide further remedial justice in the Courts of the United States*," was passed.

It confers upon the Federal Judges, in addition to the authority already conferred by law, power to grant the writ in the case of any citizen or subject of a foreign State, domiciled therein, who shall be in custody for any act done under any right, &c., set up or claimed under the sanction of any foreign power, the validity and effect of which depend upon the law of nations. And then follow the provisions, found here for the first time in any act of Congress, and which in greater fullness have been carried into the Revised Statutes and made applicable to all cases alike, regulating the procedure on the return of the writ:

"And upon the return of the writ, &c., the said

> justice or judge *shall proceed to hear the said cause*, and if upon hearing the same it shall appear that the prisoner is entitled to be discharged from such confinement by reason of such alleged right, &c., so set up and claimed, and the law of nations applicable thereto, and *that the same exists in fact*, and has been duly proved to the said justice or judge, then it shall be the duty of said justice or judge forthwith to discharge such prisoner accordingly; and if it shall appear to such justice or judge that such judgment or discharge ought not to be rendered, then the said prisoner shall be forthwith remanded."

Here also appears for the first time the further provision also carried into the revision (R. S., sec. 766), and there made applicable to all cases of *habeas corpus* that—

> "pending proceedings on appeal, and until final judgment rendered therein, and after final judgment of discharge in the same, any proceeding against any said prisoner in any State Court, or by or under the authority of any State for any matter or thing so heard and determined, or in process of being heard and determined under and by virtue of such writ of *habeas corpus*, shall be deemed null and void."

Here clearly was an unmistakable assertion of the supremacy of the judicial power of the National Government over the States and State Courts, to the full extent of withdrawing from the State Court the prisoner charged with alleged crime and there awaiting trial by jury, and providing for the summary trial by the Federal Judge without a jury, on proofs to be taken before him, of the one Federal question raised in the cause, with full power and discretion in the Federal Judge to discharge him, if he made out his claim of foreign sovereign authority, and prohibiting the States from ever again trying or touching him for that alleged offense. It is to be noted, too, that the question must, in the nature of the case, be determined by the Federal Judge, not upon a mere inspection of any statute, order, or commission, but

necessarily upon a complete exploration of all the facts, just as they would in natural course have been laid before the jury in the State Court, if the case had there proceeded. To this extent, and for the determination of this single question, it was the clear intent of Congress to override and supersede the jurisdiction of the State Court.

A brief reference to the debates in the Senate which preceded this enactment will forcibly illustrate this position. Senator BERRIEN, who introduced the bill from the Judiciary Committee, after explaining its provisions, said that—

> "the object was to allow a foreigner, prosecuted in one of the States of the Union for an offense committed in that State, but which he pleads has been committed under authority of his own sovereignty or the authority of the laws of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of *habeas corpus* is awarded *to try that issue*. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the proceedings of the State jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the Federal jurisdiction will have the power of administering prompt relief."

And, anticipating the objection that would be made to the constitutional power of Congress to pass the bill, he maintained that it was no more an infringement upon the reserved sovereign rights of the State than the interference by writ of error, every day resorted to by the appellate tribunal, over judgments in the State Courts. The same power that is competent to exercise this control is competent to exercise similar control by *habeas corpus* in criminal prosecutions.

Cong. Globe, 2d Sess., 27th Cong., p. 444.

Senator BUCHANAN (same vol., App., p. 382) took the same view of the object of the act, and opposed it vehemently for that very reason, saying:

> "This writ at once annihilates the power of the State Court to try crimes committed in violation of State laws, and transfers the trial of the case to the District Judge of the United States; and this too without the instrumentality of a jury. The arm of State authority is at once palsied by the bare presentation of this petition, and the foulest murderer may thus be released from its grasp. This is the bill before the Senate. Under it the whole power of the State falls dead, merely upon the application to the Federal Judge of a man who may be tainted with every crime."

Again:

> "Who before ever heard of the trial and final decision of any criminal cause before a judge at his chambers on this writ? Who before ever heard that it was to be substituted for an indictment and a trial by jury? Who before ever heard of its application to any other purpose than that of inquiring into the cause of commitment for the purpose of ascertaining whether the prisoner in the first instance ought to be remanded, bailed, or discharged?"

And again:

> "The present bill confers upon the District Judge *the power to try the fact* as well as the law—the fact of the excess of authority as well as the validity of the warrant. Indeed, in every criminal case, the law and the fact are so intimately blended, that it is almost impossible to separate the one from the other. This bill everywhere speaks of the hearing of the cause before the District Judge, of the proof of the facts of the final judgment to be rendered therein, and of the effect of this judgment in acquitting the prisoner from all further responsibility in the State Courts."

Senator CALHOUN took similar ground (App., same vol., p. 557).

Answering Mr. BUCHANAN's argument, that it was neither constitutional nor expedient to confer upon the Federal Courts power to interfere before judgment, and that the control by writ of error after judgment was enough, Senator CHOATE said (same vol., App., p. 541):

> "If you have the power to interpose after judgment you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the Constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or the controversy at one stage or another, is totally immaterial. The single question submitted to the national tribunals —the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims—may as well be extracted from the entire case, and presented and decided in those tribunals, before any judgment in the State Court, as for it to be revised afterwards on a writ of error. Either way they pass on no other question. Either way they do not administer the criminal law of a State. In the one case as much as in the other, and no more, do they interfere with the State judicial power."

The next piece of legislation was the act of February 5, 1867 (14 Stat., chap. 28, p. 385), which again enlarged the power of the Federal Judges to issue writs of *habeas corpus*, so as to include all cases of restraint of liberty in violation of the constitution or of a law or treaty of the United States, and here again the procedure is regulated so as to secure a full and final trial upon evidence, before the Federal Judge without a jury, of the one single Federal question arising in the case as the ground for discharge from custody, and enabling and requiring the Federal Judge to explore all the facts bearing on that one question as fully as a jury would have done, if it had been left to proceed in the State Court. Upon the return of the writ, a day is to be set for "the hearing of the cause." The petitioner may deny any material facts set forth in the return, and may allege any facts

to show that the detention is in contravention of the Constitution or laws of the United States. The pleadings on either side may be amended so that the material facts may be ascertained—

> " The said Court or Judge shall proceed in a summary way to determine the facts of the case by hearing testimony and the arguments of the parties interested, and if it shall appear that the prisoner is deprived of his or her liberty in contravention of the Constitution or laws of the United States he or she shall forthwith be discharged and set at liberty" (p. 386).

The act concludes with the same provision, staying all proceedings on the same charge, pending proceedings on appeal, and after final judgment of discharge, as was contained in the Act of 1842.

Upon the face of this act, certainly, it is impossible to put any other construction than that the one Federal question is withdrawn from the State Court for final decision by the Circuit Judge without a jury, and that the prisoner must be discharged, if that question be decided in his favor, and that, too, whether there is any provision already made by Congress for trying him or not. It was clearly intended to preclude all further trial, if, and only if, the Federal question was decided in his favor, except that the decision of the Circuit Judge was to be reviewed in this Court.

In the meantime Mr. Justice GRIER, in one of the Fugitive Slave cases, had decided (*Ex-parte Jenkins*, 2 Wall. Jr., 526), when counsel insisted that the Court on the return of the writ of *habeas corpus* had no power to discharge the prisoner, because he was held by a warrant from the State magistrate, for an alleged criminal offense against the State of Pennsylvania, *and because the warrant was conclusive evidence of the fact*, replied that, to a *habeas corpus* issued by this Court under the authority conferred

on it *by the Judiciary Act*, the objection would be conclusive, but that this writ was not allowed and issued under the general law, but under special powers conferred by the *Act of 1833*. He held that *that* act required or permitted the Court to go behind the return, to take all material proofs that were offered, to try and decide the question raised by the petition, and to discharge the prisoner if he made out his case, of an act done under Federal authority.

In this he seems to have been followed by Mr. Justice McLean, and, in all the Fugitive Slave cases, by the Circuit and District Judges, who uniformly took the Marshals by *habeas corpus* out of the hands of the State Courts, and, after fully examining the facts, discharged them where they found the plea made good, that the act for which they were arrested was not murder or assault as charged, but an act done under the authority of the United States. Thus the criminal jurisdiction of the State Court was overridden, the Federal question tried by the Federal Judge without a jury, and that, too, although the Marshals, who had committed the homicide or the assault, could be subjected to no trial for the act under the criminal jurisdiction of the United States, and although the State Courts could not touch them.

In this condition of the statutes and the decisions, the revision of the statute was made in 1874 (R. S., chap. Thirteen, *Habeas Corpus*, sections 751–766).

Sec. 752 confers the power on the Federal Judges to grant the writ "for the purpose of an *inquiry* into the restraint of liberty."

Sec. 753 limits the power as to prisoners in jail to the cases specified in the Judiciary Act of 1789 and the Acts of 1833, 1842 and 1867, the vital words in the description of cases in each of those acts being here embodied.

That Section reads as follows:

> "Sec. 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the

United States, or is committed for trial before some court thereof or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or Judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into Court to testify."

SEC. 759 declares that when the writ is returned a day shall be set "for the hearing of the cause."

SEC. 760 provides that—

"The petitioner, or the party imprisoned or restrained, may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. * * * The return and all suggestions made against it may be amended * * * so that thereby the material facts may be ascertained."

SEC. 761 declares that—

"The Court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

SEC. 766 provides that—

"Pending the proceedings or appeal * * * and until final judgment therein, and after final judgment of discharge, any proceeding * * * in any State Court or by or under the authority of any State for any matter so heard and determined, or in process of being heard and determined under such writ of *habeas corpus*, shall be deemed null and void."

It cannot be doubted that the effect of the revision is and was intended to be to make the procedure and the power and duty of the judge issuing the writ uniform and the same in all the cases covered by the several successive acts, and now embodied in section 753, to withdraw the Federal question, on which the petitioner claims justification and exemption, away from the State Court for full and final determination by the Federal Judge without a jury, and to discharge him from the custody of the State Court, when he establishes, by proof to the satisfaction of the Federal Judge, that he is entitled to his discharge, but if he fails to make out such right, then to remand him to the State Court's custody.

No other meaning than this can be imputed to the words—"*and thereupon to dispose of the party as law and justice may require*"—in view of the explicit duty to discharge contained in the Acts of 1842 and 1867, which were being condensed and revised, and of the obvious intent to subject all cases alike to the same regulation.

Such being the very purpose and object of the statute, then, to stay the criminal proceeding in the State Court pending the inquiry under the *habeas corpus* before the Federal Judge; to withdraw from the jurisdiction of the State Court the single question of justification or immunity under Federal authority raised by the petition; to submit that question for decision to the Federal Judge without a jury, upon all possible facts material to it; to require and empower him to discharge, if the petitioner establishes by proof the justification or immunity claimed; and to make the judgment of discharge final, when affirmed on appeal, and effectual to stay all proceedings by the State Court or the State in the same matter—it is idle to claim that the Federal Judge must not or may not exercise his power to discharge, upon the proper proofs being made out, if the result will be to set free the party charged with crime, and who may, after all, have committed it, in the case where no provision has been made by Federal

statute for bringing him to trial, before a jury, for the homicide or the assault.

Under this statutory scheme of *habeas corpus*, it is wholly immaterial whether there is any provision by Federal criminal law conferring jurisdiction upon any Court over the prisoner when discharged. Congress has by this very act made what it deemed to be suitable provision for the case by substituting for a trial by jury, under Federal authority, of the one question of justification, a trial by a judge without a jury, and by the Supreme Court on appeal. If he makes out such justification before that tribunal, the necessary theory of the act is that he is to be deemed innocent; that he has committed no crime; that he has only done what the supreme law of the country has required him to do. If, however, he fails to make out his alleged justification under Federal authority, then he is remanded for trial on the charge made in the State Court.

These several enactments were passed in great national crises and emergencies, for the very purpose of rescuing, from possibly hostile action of States and State Courts, persons employed in the service of the United States, and of protecting them in the discharge of their duties to their country. As the debates in Congress show, the objection to infringement upon the criminal jurisdiction of State Courts, over crimes alleged to have been committed on the soil of the State, was weighed and considered, and was made to yield to the paramount necessity of protecting public servants of the Federal Government in the discharge of their duty.

In the cases provided for by the Acts of 1842 and 1867, there could not well be, in the nature of the cases, any procedure against the party concerned provided in the criminal jurisdiction of the United States. McLeod, for instance, could not possibly have been brought within any scheme of Federal criminal law, because the whole theory of the Government and of the case was, that, having a commission from a foreign government, to which he owed allegiance as his sovereign, to do what he did, he could not be

made answerable personally to any of our criminal law, State or Federal.

Now, we have seen that the scheme and effect of the revision has been to make the law and the procedure uniform in all classes of cases, and it is equally immaterial, in all the cases, whether, after being discharged by the Federal Courts on final judgment, the party can be arrested and tried before a Federal tribunal, or not.

Again, there is no violation of any guarantee of trial by jury. That guarantee is to the prisoner, and not to the State. If the prisoner prefers a trial by jury to the summary trial and decision, provided by the act, of his plea in bar, of justification or immunity, he can stay in the State Court and take it. But Congress meant to give him, and has given him, an opportunity to have this single Federal question examined and decided by a Federal Court. If he does not see fit to avail himself of this opportunity, he need not.

Nor can any distinction be drawn, under this consistent, and uniform scheme of *habeas corpus*, provided by the Revised Statutes, alike in all cases, between the case where the justification rests upon a specific statute, or upon a written order, decree, or commission, and those cases where it rests on the general principles of the Federal Constitution or law, and is to be established by parol proof, all of which must be explored and considered, upon the return of the writ, by the Federal Judge, thus supplanting the natural province of a jury, and of the state jury, on a question of pure fact. No matter how explicit the statute, or the order, decree or commission may be, when the party is charged with crime against the State for an act claimed to have been done under the authority of a law or of the Constitution of the United States, the question of excess of authority is always one of fact, to be determined on oral proof, and is a question of the same nature as that involved entirely in oral proof in the other cases supposed.

Besides, the point is, that the statute makes no distinction; in all cases alike the Court is bound to take all the material proofs, of whatever such proofs consist, to decide

upon the claim of justification, and law and justice require the Court to discharge the petitioner, if such justification is proved.

It is certainly too late at this day to question or discuss the power of Congress to provide, by means of this scheme of *habeas corpus* procedure for the removal from the State Court into the Federal Court, for examination and determination, of this single question of Federal authority, or of custody in violation of the Federal Constitution and laws, when it arises in any case, civil or criminal, in a State Court.

This exercise of power under the Constitution is far within that which was conceded to Congress by this Court in *Tennessee* v. *Davis*, 100 U. S., 257. There an act, providing for the removal, before trial, of an indictment for wilful murder in the State Court, was sustained as constitutional, the removal to be effected by the petition of the party indicted, setting forth that the act for which he was indicted was an act done by him as an internal revenue officer, under color of his office and of the law under which he was appointed, according to section 643 of the Revised Statutes.

It was distinctly held—

That the provision of the Constitution declaring that the judicial power of the United States extends to "*all* cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority," embraces alike civil and criminal cases, and both are equally within that power.

That a case arises under the Constitution, not merely where a party comes into Court to demand something, a right to which is conferred upon him by the Constitution, a law of the United States, or a treaty, but wherever a correct decision as to the right, privilege, claim, protection, or defense of a party, in whole or in part, depends upon the construction of either; for it is in the power of Congress to give the Courts of the United States jurisdic-

tion of such a case, although it may involve other questions of fact or law.

That if the case, whether civil or criminal, be one to which the judicial powers of the United States extend, its removal to the Federal Court does not invade State jurisdiction, but that, on the contrary, a denial of the right of the General Government to remove, take charge of, and try any case arising under the Constitution and laws of the United States is a denial of its conceded sovereignty over a subject expressly committed to it, and is a denial of a doctrine necessary for the preservation of the acknowledged powers of the Government.

It was also expressly declared in that case, that, as the power of removal of the indictment for murder on State soil rested upon these essential doctrines of sovereignty, the question as to whether or not there was any mode and manner of procedure in the trial, prescribed by the act of Congress, *was totally immaterial* to the inquiry whether the case was *removable*. The very point of contention and dissension, between the two learned Judges who dissented and the majority of the Court who united in the decision, was as to the power of Congress to remove an indictment for murder on the soil of the State from the State to the Federal Court, when and if there was in the latter no criminal jurisdiction whatsoever over the particular case.

If, then, in such a case, the whole case may be constitutionally removed, indictment, prisoner and all, leaving nothing in the State Court, and this be no invasion of State sovereignty, how much more clearly is it within the power of Congress to extract from the case the one Federal question, and remove it, by this scheme of *habeas corpus*, for examination and decision, into the Federal Court, leaving the indictment in the State Court to be there tried against the prisoner, if he be remanded to its custody, in the event that the Federal Court, pursuing the mode of trial devised by Congress, decides against his claim of Federal authority and immunity.

In truth, the alarm which is suggested at the idea of its being entrusted to a Federal Court, consisting of two Judges, to try, subject to a review in this Court, the question of Federal authority and consequent immunity, as being a possible mode of escape for a party possibly guilty of murder, without any trial, is based upon no foundation. The single question is to be fully tried, not upon affidavits, but upon testimony—not *ex parte*, but after a full hearing of both sides. And the power entrusted to the Federal Court over this one question is not so great as the same power over the whole case, which is entrusted to the ordinary committing magistrate, or to the Judge on the trial, on the motion to quash, or on a motion in arrest of judgment after verdict. It is, in legal apprehension, the same power which is given to this Court, upon the single Federal question, on writ of error.

The obvious danger to the Federal official which Congress must have had in view and designed to provide against, in providing this summary mode of trial, in the Federal Court, of the claim of Federal authority and immunity, is apparent. The successive acts were passed in times of great public excitement, to meet and guard against threats and demonstrations, in certain States, of general hostility to the lawful authority of the United States, as the supreme national government of the whole country. They were passed for the express purpose of protecting the exposed Federal officials, summarily and effectually, from this hostility. It was perceived that this hostile temper would naturally, if not necessarily, find its way into the jury box, and that the Federal official, indicted for murder, or other lesser crime, because of the performance of a duty imposed upon him by Federal authority, by a hostile State Grand Jury, would not or might not be sure of a fair trial before a hostile or prejudiced State jury, and that if, unfairly ignoring his claim of Federal authority, they should find a verdict against him, there would be no remedy. His writ of error would be of no avail, because of the lack of power in this Court to review facts found

by a jury. And so against right he would be hanged, or subjected to less degrading punishment, for the honest and proper discharge of his duty to his country. Against this obvious danger, the *habeas corpus* acts provided an effectual, and a proper and necessary protection.

The claim, then, of Neagle, presented in his petition upon the facts there stated, that the act for which he was charged with murder was no murder, because it was an act done by him under Federal authority, in pursuance of a law of the United States, and that his being kept in custody therefor was, upon those facts, in violation of the Constitution and laws of the United States, unquestionably gave jurisdiction to the Circuit Court to try and decide that question in the mode pointed out by the statute. That Court had no alternative. It must issue the writ, and, after the return, it must decide the question. It could not shrink from the responsibility. It must hear all the material facts, and if it decided that what he did was in the performance of Federal duty, or that he was in custody in violation of the Constitution or laws of the United States, he was entitled to his discharge. And the question for this Court is, whether upon the facts proved the decision of the Circuit Court upon that question was right.

No case appears to have arisen under section seven of the Act of 1833 for twenty years after its passage. The other provisions of that statute were temporary, being enacted for five years only, but the enlargement of this power and jurisdiction of the Federal Courts to relieve from custody all persons restrained of their liberty on account of acts done in discharge of a Federal duty was intended to be a permanent enactment. The provision in regard to the removal from the State to the Federal Courts of suits and prosecutions against Federal officers was limited to those arising under revenue laws, but the power to issue writs of *habeas corpus* extended to *all* cases of custody for acts done under any law of the United States, it being the evident belief of Congress that the time had come to provide

suitable means for asserting and vindicating the sovereignty of the United States by the intervention of the Federal Courts in all such cases.

Therefore, when the execution of the obnoxious Fugitive Slave law exposed the Marshals to violent opposition and attack in the discharge of the duties imposed upon them by Congress, and to arrest, indictment and trial in the State Courts on charges of assault or murder, for acts necessarily done by them in the performance of such duties, they immediately appealed to the Federal Courts for the protection afforded by this section seven and the Circuit Courts have uniformly used it for the efficient protection and relief of all Federal officers so charged and in custody, and, this, as we submit, with the implied assent of Congres and the express approval of this Court. The result of this line of decisions is so cogent, in support of the action of the Court below in this case, as to command careful attention here.

In *Ex parte Jenkins*, 2 Wall., Jr., 521 (1853), Jenkins the Marshal, and his deputies, in executing a warrant for the arrest of the fugitive, had a bloody encounter with him. A third party obtained from a Justice of the Peace a warrant for the arrest of the Marshal for assault with intent to kill. A constable arrested the deputies and put them in jail, and they presented to the Circuit Court a petition for a writ of *habeas corpus*. Mr. Justice GRIER fully and clearly recognized the exclusive jurisdiction of the State Courts to try all charges of crime, but asserted as his cardinal proposition, that although the jurisdiction of the Federal Courts is limited, it is, within its limits, supreme. To the point made against the discharge of the prisoner, that the Court had no power to discharge him because he was held by a warrant from *the State magistrate* for an alleged *criminal offense* against *the State of Pennsylvania*, and that the warrant was conclusive evidence of the fact, he said and conceded that this would be a conclusive objection, if the writ had been issued under the authority conferred by the Judiciary Act, but held

that, as the petition stated and the proof showed that the prisoner had been committed for an act done in pursuance of a law of the United States, the Act of 1833 justified and required his discharge. Continuing, he said (at p. 528-530):

> "A warrant of arrest issued by a Justice of the Peace has none of the characteristics of a judgment of a court of record, and is, therefore, not conclusive evidence that the prisoner is rightly deprived of his liberty. It is every day's practice to inquire into its regularity, and whether it has been issued on sufficient grounds to justify the arrest and imprisonment. If this could not be done, the writ of *habeas corpus* would little deserve the eulogies which it has received as a protection to the liberty of the citizen. * * * *
>
> "The authority conferred on the Judges of the United States by this Act of Congress gives them all the power that any other Court could exercise under the writ of *habeas corpus*, or gives them none at all. If, under such a writ, they may not discharge their officer when imprisoned 'by any authority' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may acknowledge their utter impotence to protect him? This act was passed when a certain State of this Union had threatened to nullify Acts of Congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such State legislation. If the State of Pennsylvania had, by Act of Legislature, declared that the Fugitive law should not be executed within her borders, and had directed her officers to arrest and imprison those of the United States who should attempt to execute it, would not this Court have been bound to treat such act as unconstitutional and void, and discharge their officers from imprisonment under it? And have they no power to do so when intermeddlers endeavor to abuse State process for the same purpose? If the Marshal and his officers may be arrested for serving process, why not the Commissioner and Judge who issued the process? *The extreme advocate of State rights would scarcely contend that, in such cases, the*

Courts of the United States should be wholly unable to protect themselves or their officers.

"If such a state of affairs can be brought about at the instance of any person who is willing to swear without scruple to that which he does not know to be true, or perhaps knows to be false, *then indeed has been discovered a safe mode of nullifying the Constitution and laws of the United States.*"

Afterwards *Thomas*, the fugitive, brought a civil suit against the Marshals for the alleged assault, in the Supreme Court of Pennsylvania, in which they were arrested and held to bail, and, not giving bail, were committed to prison. Judge KANE, in the absence of Mr. Justice GRIER, again discharged them.

2 Wall. Jr., 531.

Again, a third time, the same Marshals were arrested upon a bench warrant issued by the County Court, under an indictment found by the Grand Jury for assault with intent to kill, based upon the same facts, and a third time the Circuit Court discharged them. On this final hearing, Judge KANE used this pertinent language as to the supposed failure of justice that might result from the Federal Courts interfering with the custody of a prisoner charged with crime in a State Court, and releasing him, when there was no act of Congress under which he could be tried for the offense charged—language which is applicable to the present case (at p. 43):

"It has been urged that my order if it shall withdraw the relators from the prosecution pending against them [in the State Court] will in effect prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this Court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused, but they nowhere recognize it as a right of the Government, either State or Federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after

> conviction; it is arrested by the entering of *nolle prosequis* while the case is at the bar; it is made ineffectual at any time by the discharge on *habeas corpus;* it is in many cases controlled, or even negatived in advance by the Judge's certificate of probable cause. And there is no harm in this. No one imagines that because a man is accused he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating them. Their objects are general—they look to the public well-being, and if this can be more readily or more certainly promoted by withholding the cause from trial than by pressing it on to a verdict, it is politic, and it is not unjust so to withhold it."

This case gave rise to a very learned and able review by the Supreme Court of Pennsylvania of the opinions of Mr. Justice GRIER and Judge KANE, and as it contains the only judicial dissent ever uttered to the construction of the Seventh section of the Act of 1833, upon which their action proceeded, and as every ground upon which it rested has been entirely removed by Congress in the revision of the statutes of the United States, it deserves the most careful attention.

In the case of *Thomas* vs. *Crossin*, 5 Penn. L. J. Rep. (Clark), 328, being the action in which Thomas, the fugitive, had obtained a warrant of arrest against the Deputy Marshals, from custody under which they had been discharged by Judge KANE, the Sheriff made return of the fact of this discharge, and, after the lapse of nine months, a motion was made in the State Court for an attachment against the Sheriff on the ground of an insufficient return and for a failure to bring in the bodies of the defendants, thus directly raising the question whether the Sheriff was bound to obey the order of discharge made by the Circuit Court of the United States, and whether that Court had jurisdiction over the parties, and as to the manner in which it was exercised.

LEWIS, *Ch. J.*, in a most elaborate opinion, held that there was no such jurisdiction in the Federal Courts.

After calling attention to the great and obvious difference between (1) imprisonment for an act done in obedience to the authority of the United States, and (2) being held to bail, as the affidavits and warrant in the case before him showed, the defendants to have been, for an assault and battery committed without such authority, and to the fact that the State of Pennsylvania had passed no law authorizing imprisonment for any act done under Federal authority, he proceeded to inquire whether the Act of 1833 had any application to the case. He examineed carefully the history of that act and its several provisions, and also those of the Act of South Carolina of December, 1832, which gave rise to its passage, and reached the conclusion that, as this seventh section was intended specially to remedy the evils caused by the nullification of South Carolina, and as the general purpose and language of the Act of Congress was confined to that object alone, it could not, by any known rule of expounding statutes, be carried by construction to matters not within the letter or spirit of the act, nor within the mischief to be remedied, but must be confined to cases where there is an avowed purpose, by some authority or law of a State, to disregard an act of Congress, and to imprison, or otherwise punish, the officers of the United States for enforcing it, and was intended to operate only in cases where this purpose appears on the face of the proceedings. He holds that no authority was given to the United States Judges to go behind the cause of detainer returned on the writ of *habeas corpus*, and to investigate and try questions of fact without the intervention of a jury, or to adjudge that the cause of detainer was other than that which appeared on the face of the return; that no such extraordinary power was called for by the exigency of the case, and that, therefore, no such authority was given by the act; that, on the other hand, to relieve against such an imprisonment of Federal officers as the statute of South Carolina threatened, required no trial by jury, for no facts could be in dispute, the whole case being resolved into a pure question of law, as to whether a State had the power to

nullify an act of Congress; and that the warrant of arrest and the indictment would necessarily describe the offense as it was described in the statute creating it. He then shows the sharp contrast between the Act of 1833 and the Act of 1842, already referred to, which grew out of the *McLeod case*, pointing out that, in the cases contemplated by the latter act, the indictment in the State Court for murder, &c., would not exhibit upon the face of the proceedings the justification arising under the law of nations, and that therefore the Act of 1842 necessarily authorized the United States Judges, upon the return of the writ, to "hear the cause" and receive proof of the justification relied on.

> "This power," he says, "was deemed absolutely necessary to enable the General Government to meet its responsibilities to foreign nations, and to save the country from being involved in a war through the action of State authorities. But even in this extraordinary exigency full provisions were made in the act for an appeal from the decision of the Judge on *habeas corpus* to the Supreme Court of the United States. But no such provisions are contained in the Act of 1833. No authority is given to 'hear the cause' nor to receive proofs apart from the cause of detainer returned. The difference between the two acts, and the diversity in the several occasions which produced them, show that Congress intended that the powers granted by and the mode of action under them should also be different. In the one case the Judges were confined to the cause of detainer returned, for the reason that this was all that was required to accomplish the object of the act. *In the other they were authorized to go behind the return and to inquire into the facts and merits of the justification relied on; for nothing short of this would effectuate the manifest intention of the law or meet the mischief designed to be remedied.*"

But now that Congress, in the revision of the statutes, in the face of this decision, has, as we have shown, reenacted the vital clause of section seven of the Act of 1833, forty years after all the other provisions of that act had

expired, and without any reference to them, but generally to provide for relief from custody for acts done under Federal authority, and has also assimilated the procedure in all the cases in which section 753 provides for the writ, and has applied to all cases alike the provisions which were here pointed out as peculiar to the Act of 1842—"the hearing of the cause," the requirement to receive all material allegations and proof thereof, the stay pending appeal, or after final judgment of discharge and the appeal to this Court—it is evident that the clear intention of Congress was that, in all cases, the Federal Courts should go behind the return and explore the facts going to constitute the alleged justification under Federal authority, and that nothing short of this would effectuate the manifest intention, or meet the mischief designed to be remedied. That mischief is the arrest and attempted punishment by State Courts, or by anybody else, of servants and agents of the Government of the United States, or of any other person for acts done by its command, or under its authority. And so, under the act of Congress as it now stands revised, the opinion of Chief Justice LEWIS, which has been heretofore the only dissenting voice from the uniform current of authority on the question, stands as a conclusive argument in favor of the jurisdiction exercised in the case at bar by the Court below.

In *Ex parte Robinson*, 6 McLean, 355, Mr. Justice MCLEAN discharged a Marshal upon *habeas corpus* from the custody of the sheriff, to which he appears to have been committed by the order of the Court of Common Pleas, for the performance of his duty as Marshal in rearresting the fugitive, after that Court had upon *habeas corpus* ordered her discharge.

In this case Mr. CHASE, afterwards Chief Justice of this Court, appeared as counsel against the discharge of the Marshal.

In a similar case, *Ex parte Robinson*, 4 Am. Law Reg., 617, LEAVITT, *D. J.*, following the authority of Justices

McLEAN and GRIER, discharged the same Marshal from the custody of the sheriff, to which he had been committed by the State Court for a contempt in not obeying its process for the production before it of the fugitive.

In *U. S.* vs. *Morris*, 2 Am. Law Reg., 348, MILLER, *D. J.*, discharged from State custody, under the seventh section of the Act of 1833, the claimant of a fugitive who had been arrested and imprisoned on a charge of assault and battery upon the fugitive.

In *Re McDonald* (1861), 9 Am. Law Reg., 662. TREAT, *D. J.*, discusses at great length the power and duty of the Federal Judges under the seventh section of the Act of 1833.

In *U. S. ex rel. Roberts* vs. *The Jailer of Fayette Co.*, 2 Abbott (U. S.), 265 (1867), the Circuit Court, BALLARD, *J.*, discharged on *habeas corpus* a Marshal who had been committed and imprisoned, under a warrant from a State Court, on the charge of murder, for a homicide necessarily committed in the attempt, which was resisted, to execute process under the internal revenue laws, relying upon the authority of Justices GRIER and McLEAN.

In this state of the adjudications under the seventh section of the Act of 1833, Congress revised the entire series of statutes in regard to *habeas corpus* in the manner already pointed out. It must be deemed to have known and approved the settled construction which the Federal Courts, for more than twenty years, had given to the Act of 1833; and when it incorporated in section 753 the cases covered by that Act with the cases covered by the Judiciary Act and the Acts of 1842 and 1867, and enjoined upon the Circuit Courts, in all the cases alike, the duty to make a full and exhaustive inquiry into the facts, and to hear the cause and render final judgment of discharge, if law and justice so required, it must be deemed to have intended to sanction and confirm the exercise of the jurisdiction which

the Federal Courts, under the more limited scope of the Act of 1833, had habitually asserted.

McDonald vs. *Hovey*, 110 U. S., 629.
Duramus vs. *Harrison*, 26 Ala., 326.
Sedgwick on Construction of Stat. (2d Ed.), 229, *note*, and cases cited.

After the revision, other cases occurred, where the Circuit Courts released upon *habeas corpus* parties held in custody by the State Courts for alleged crimes against the State.

Ex parte Bridges (1875), 2 Woods, 428.

Bridges had been *convicted* in the Superior Court of Randolph County, Georgia, of perjury before a United States Commissioner.

BRADLEY, *J.*, released the relator, saying (at p. 432) that—

> "Although it may appear unseemly that a prisoner, after conviction in a State Court, should be set at liberty by a single Judge on *habeas corpus, there seems to be no escape from the law.*"

In *Rambold* vs. *The Jailer*, 2 Flipp., 457 (U. S. Dist. Ct., Kentucky), a Deputy Marshal had killed a citizen of Kentucky, while in the discharge of his duty, and the State authorities had arrested the Marshal, who was discharged on *habeas corpus* by the Federal Court, three times in succession, as in the *Jenkins Case*.

In *Re Brosnahan*, 18 Fed. Rep., 62, where the prisoner, being in custody for a crime against the State of Missouri, created by a statute of that State, sued out a writ of *habeas corpus* in the Circuit Court, claiming that the statute was in violation of the Constitution of the United States, MILLER, *J.*, said (at p. 64):

> "It is quite clear that, if the Missouri Statute is justly obnoxious to either of the four first objections

named, it is void, and the person held for violating that statute is in custody in violation of the Constitution of the United States, and *the power and duty of this Court to discharge him are unquestionable.*"

Such being the course of adjudication in the inferior courts of the United States, the deliberate reference by this Court to this jurisdiction in *Ex parte Royall*, 117 U. S., 241, though perhaps to some extent *obiter*, is in the highest degree significant.

Royall, being in the custody of the State Court in Virginia, for an offense against the statute law of that State. applied to the United States Circuit Court for a writ of *habeas corpus*, claiming that the statute under which he was held was in violation of the Constitution of the United States, and therefore void, and that, as a consequence, his detention in custody was in violation of the Constitution, within the meaning of section 753 of the Revised Statutes. The petition was dismissed by the Circuit Court, which refused to grant the writ upon the ground that the Circuit Court was without jurisdiction to discharge the prisoner from prosecution.

Upon this point, which seems to be the very point of jurisdiction involved in the case at bar, this Court, on full consideration, overruled the decision below, and held that the Circuit Court had unquestionable jurisdiction. The Court said, speaking through Mr. Justice HARLAN (at pp. 249–250):

> "As the judicial power of the nation extends to all cases arising under the Constitution, the laws, and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended, unless when in cases of rebellion or invasion the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; *no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the Courts of the Union and of their*

> *Justices and Judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution.* The grand jurors who found the indictment, the Court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, 'anything in the Constitution and laws of any State to the contrary notwithstanding. * * * *
>
> "We are therefore of opinion that *the Circuit Court has jurisdiction* upon writ of *habeas corpus to inquire* into the cause of appellant's commitment, *and to discharge* him if he be held in custody in violation of the Constitution."

But the Court held further, that, while it had the undoubted power to discharge at any stage of the proceedings in the State Court, it was discretionary with the Circuit Court to determine at what time and at what stage of the proceedings in the State Court it would so interfere, whether in advance of the trial, or after conviction, and cited with approval the decision of BRADLEY, *J.*, in *Ex parte Bridges, supra*, that the same jurisdiction and power remained in the Circuit Court after conviction in the State Court as before, and adopted as its own the very language above quoted from the opinion of Mr. Justice BRADLEY. And so it was decided that, as it did not appear that the Circuit Court might not in its discretion, and consistently with law and justice, have denied the applications for the writ at the time they were made, the judgment should be affirmed, but without prejudice to the right of the petitioner to renew his application to the Circuit Court at any future time.

It was in the course of its consideration of this latter question that this Court made use of the observations upon which we most confidently rely, as an express approval of

the long series of decisions in the Circuit Courts, by which Marshals and other officers of the United States, charged with common law crimes, such as murder and assault, in the State Courts, were released from custody, upon the ground that such alleged crimes had been in fact no crimes, because they were acts done in discharge of a Federal duty resting upon the party charged; between which and the cases, like those of *Royall* and *Bridges*, of ordinary persons charged with a violation of State laws, and claiming to be held in custody therefor contrary to the Constitution, the Court drew a plain and clear distinction. The Court said (at p. 251):

> "When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a Court or Judge thereof; or where, being a subject or citizen of a foreign State and domiciled therein, he is in custody under like authority for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign State, &c., or under color thereof, the validity and effect whereof depend upon the law of nations: *in such and like cases of urgency, involving the authority and operations of the general government*, or the obligations of this country to, or its relations with foreign nations, *the Courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners* who were held in custody under State authority."

There are no other reported cases in the Federal Courts, to which this language can have referred, except the decisions above cited of Justices GRIER and MCLEAN, and of the Circuit Judges who followed their authority.

We therefore submit that we have both the implied approval of Congress, and the express approval of this Court, of those decisions.

In *Wildenhus' Case*, 120 U. S., 1, the appellant, who was in the custody of a State Court in New Jersey, charged with murder, applied to the Circuit Court for a writ of

habeas corpus, upon the claim that such custody was in violation of the treaty with Belgium, and, his application having been refused, he appealed to this Court, which held that, if such was the case, the Circuit Court had clear jurisdiction and power to discharge him under section 753 of the Revised Statutes; and the Court then went into an elaborate examination to determine whether the case came within the treaty.

Third Point.

The personal protection of Mr. Justice FIELD *by Neagle was a duty imposed upon him by authority of the United States, and the homicide necessarily committed by him in rendering that protection effectual was "an act done by him in pursuance of a law of the United States" in the sense of the statute; and his detention therefor by the State Court on a charge of murder was "in violation of the Constitution and laws of the United States" in the sense of the statute.*

A.

Two observations may properly be made at the threshold of this discussion.

First.—Of course we do not pretend that there is any *single* specific statute making it, in so many words, Neagle's duty to protect the Justice. The act can be subjected to no such narrow construction as to require that. Having been passed in successive enactments for the express purpose of enlarging and making more effectual the great writ of liberty, and of "providing further remedial justice in the Courts of the United States," it is entitled to a construction sufficiently liberal to make it effectual for the purposes which it was designed to accomplish; and in order to bring the case of Neagle within the meaning of the act it will be enough for us to establish

that, for his conduct and acts in protecting Mr. Justice FIELD, there was lawful authority under the Constitution and laws of the United States, and that his detention therefor was, therefore, in violation thereof. *His authority and duty to protect the Justice did arise directly and necessarily out of the Constitution and positive Congressional enactments. Whatever is necessarily implied, is as much a part of the Constitution and Statutes as if it were actually expressed therein.*

Second.—The fact that, in order to afford effectual protection to the Justice, Neagle was compelled to take life, is purely incidental. Though this fact may alter the case to the popular mind, it certainly cannot to the judicial mind. If the effectual protection of the Justice had been accomplished by simply binding the hands of Terry, or inflicting a slight wound, and Neagle had thereupon been indicted in the State Court for assault, the very same question would have been presented as that which arises upon this record.

Certain propositions may be stated as axioms, placed beyond the reach of further discussion by decisions already pronounced by this Court, on the relations of the Federal and State Governments and jurisdictions.

The corporate government established by the Constitution is a nation, absolutely sovereign over every foot of soil and over every person within the national territory and within the sphere of action assigned to it. Within that sphere, its Constitution and laws are the supreme law of the land, and its proper instrumentalities of government can be subjected to no restraint, and can be held to no accountability by any other power whatsoever.

It has, necessarily, the inherent power of protecting itself and its agents in the exercise of all its constitutional powers, and of executing its own laws by its own tribunals, without any interruption from a State or any State authorities.

The Government of the United States and the government of a State are distinct and independent of each other, within their respective spheres of action, although existing

and exercising their powers within the same territorial limits.

Neither government can intrude within the jurisdiction of the other, or authorize any interference therein, by its judicial officers, with the action of the other. But whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National Government have supremacy, until the validity of the different enactments and authorities are determined by the tribunals of the United States.

In such case, the surrender to a State Court of the right to determine the existence of its sovereignty is the surrender of sovereignty itself.

In *Martin* vs. *Hunter's Lessee*, 1 Wheat., 304 (1816), which established that the appellate jurisdiction of this Court extends to the final judgment or decree in a State Court, where a Federal question is involved, STORY, *J.* said (as a cardinal guide in the construction of Federal powers under the Constitution):

> "The Constitution unavoidably deals in general language. It did not suit the purposes of the people in framing this great charter of our liberties to provide for minute specification of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter: and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its

powers as its own wisdom and the public interests should require" (p. 326.)

And (p. 328):

> "Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared in establishing one great department of that government, which was in many respects national and in all supreme. It is a part of the very same instrument which was to act not merely upon individuals but upon States, and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others."

And JOHNSON, *J.*, said (p. 363):

> "I view this question as one of the most momentous importance, as one which may affect in its consequences the permanence of the American Union. It presents an instance of collision between the judicial powers of the Union and one of the greatest States in the Union, on a point the most delicate and difficult to be adjusted. On the one hand *the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.*"

In *McCulloch* vs. *Maryland*, 4 Wheat., 316, MARSHALL, *Ch. J.*, said (at p. 405):

> "If any one proposition could command the universal assent of mankind we might expect it would be this, that the Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all, its powers are delegated by all, it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have in express terms de-

> cided it by saying: 'This Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land.' * * * * * * * *
> The Government of the United States, then, though limited in it powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.'"

In *Cohens* vs. *Virginia*, 6 Wheat., 264 (1821), which established that a writ of error could run from this Court to bring up the final judgment of the highest court of a State in a criminal case, where a defense founded upon an act of Congress had been overruled in the State Court—

MARSHALL, *Ch. J.*, said (p. 382):

> "With the ample powers confided to this supreme government for these interesting purposes are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Constitution. The maintenance of these principles in their purity is certainly among the great duties of the Government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases of every description arising under the Constitution or laws of the United States.

Again (p. 387):

> "But a Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, *and its framers must be unwise states-*

> *men indeed if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws, against other dangers than those which occur every day.* Courts of justice are the means most usually employed, and it is reasonable to expect that a government should repose on its own courts rather than on others. There is certainly nothing in the circumstances under which our Constitution was formed, nothing in the history of the times which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating in the form of law the legitimate measures of the Union."

And again (p. 389):

> "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

In *Ableman* vs. *Booth*, 21 How., 506, which settled forever the principle that the process of a State Court or judge has no authority within the limits of the sovereignty assigned by the Constitution to the United States—

TANEY, *Ch. J.*, said (at pp. 517–518, 523–525):

> "The Constitution was not formed merely to guard the States against dangers from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained there would be but little danger from abroad; and to accomplish this purpose it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty, which the States then

possessed, should be ceded to the general government, and that, in the sphere of action assigned to it, *it should be supreme, and strong enough to execute its own laws by its own tribunals without interruption from a State or from State authorities, and it was evident that anything short of this would be inadequate to the main objects for which the government was established;* and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them armed with power enough to protect and guard the rights of all by appropriate laws to be carried into execution peacefully by its judicial tribunals. * * * * It was essential, therefore, to its very existence as a government that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws. * * * This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows necessarily out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action prescribed by the Constitution of the United States independent of the other. But after the return is made, and the State Judge or Court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known by a proper return the authority under which he detains him, it is at the

same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States in any respect, in the custody of his prisoner, *it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference.* No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence. * * * *

"Now it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith."

In *Siebold's Case*, 100 U. S., 371, BRADLEY, *J.*, said (at pp. 394, 396):

"We are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We

hold it to be an incontrovertible principle that the Government of the United States may by means of physical force exercised through its official agents execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws and hence the power to keep the peace to that extent. * * * *

"The National Government * * * must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And to do this it must necessarily have the power to command obedience, to preserve order, and to keep the peace; and no person or power in this land has the right to resist or question its authority so long as it keeps within the bounds of its jurisdiction."

In *Tennessee* vs. *Davis*, 100 U. S., 257, STRONG, *J.*, said (at p. 263) that the United States Government—

"can act only through its officers and agents and they must act within the States. If when thus acting and within the scope of their authority, those officers can be arrested and brought to trial in a State Court for an alleged offense against the laws of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, if their protection must be left to the action of the State Court, the opera tions of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State but equally Federal law in such a manner as to paralyze the operations of the government. And even if after trial and final judgment in the State Court, a case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution and the exercise of acknowledged Federal power arrested.

> "We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No State Government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."

Thus far, in the search for Federal authority for Federal law, "in pursuance of" which Federal Judges, engaged in the performance of their judicial duties, are to be protected, soas to secure the effectual discharge of those duties, we have consulted only the Constitution itself, and its nature and necessary effect, as expounded by the consistent decisions of this Court from the beginning until now, and we find that we have a government which, within the scope of its powers, within the field of its authorized functions, is absolutely sovereign and independent of every other power, State, or person; that its authority covers every inch of soil, and reaches, and is entitled to command and enforce the obedience of, every person in the land; that, while it can exercise its powers only through its officers and agents, it can and must protect those officers and agents, and that, wherever it fails to do so, it abandons its sovereignty. No State, no Legislature, no Court, no combination of persons, no single person, can, without violating the Constitution, exclude these officers and agents from the exercise of any authority, or the performance of any duty conferred or imposed upon them under the Constitution, or obstruct or interfere with them, for a moment, in the performance of their duties. Against all obstacles, the Constitution requires them to proceed straight forward in the discharge of those duties.

Such absolute and perfect protection being thus guaranteed to them by the Constitution, this at least must

necessarily follow: that if, when attacked in the discharge of their duties, they protect themselves, or are protected by others, whose aid in the emergency they require, such protection is not merely self-defense authorized by the law of nature or the common law, but is an act clearly authorized by, and done in pursuance of, the Constitution, which enjoins them to proceed against all obstacles in the discharge of their duties.

But, to come closer to the question of the protection of Federal judges, and of this Judge in particular, and to the case of the person who undertook the duty of protecting him, and to the question as to how far that protection was an act done in pursuance of Federal law, we may and must look further, and examine those express provisions of Federal law which relate to the Judiciary, and the judicial circuits, and the functions and duties imposed by law upon the individual judge.

We have seen already, in the decisions from which we have quoted so fully, how large a part has been ascribed, especially in the opinions of Chief Justices MARSHALL and TANEY, to the Judicial Department, in the exercise of the functions and attributes of sovereignty vested by the Constitution in the Government of the United States. But therein those great jurists were only uttering the voice of the Constitution itself.

In an absolute monarchy, all the attributes and functions of sovereignty vest in a single person, who can and must—for otherwise he ceases to be sovereign—protect himself and all his officers and agents in the discharge of official duties charged upon them. But the wise framers of our Government, and the people who ordained it, "in order to secure the blessings of liberty to themselves and their posterity," have distributed these attributes and functions among the three great departments, the Executive, the Legislative, and the Judicial, so that each should be a check and balance to the other two, and all work together for the great objects for which the Consti-

tution was ordained and established. The judicial power, which is an essential part of the sovereignty, instead of being exercised by a monarch in person, is vested in the Federal Courts, and the Judges who compose them partake of and exercise this power. Wherever they go they represent in their persons, in their judgments, and in their acts, that portion of the sovereignty.

But for the letter of the law, as it is so stoutly insisted that we must have "*a law*" to authorize the protection of the Judge:

Article III., section 1, of the Constitution, declares that—

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

And the second section proceeds to define the cases to which this judicial power shall extend, and, as JAY, *Ch. J.*, says, in *Chisholm* v. *Georgia*, 2 Dall., 475, this shows the precise sense and latitude in which the words "*to establish justice*," as used in the Preamble, are to be understood.

To carry into practical operation the provisions of the Constitution, "to establish justice," and bring it home to the people, Congress has—

Divided the United States into judicial districts (R. S., sec. 530).

And the State of California constitutes two judicial districts (R. S., sec. 531. Act of August 5, 1886, 24 Sts., 308, ch. 928).

The judicial districts of the United States are divided into nine circuits, and California is included in the Ninth Circuit (R. S., sec. 604).

The Chief Justice and Associate Justices of the Supreme Court are allotted among the circuits by an order of the

Court, and a new allotment is to be made whenever it becomes necessary or convenient, by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or Associate Justice, or otherwise (R. S., sec. 606).

Upon the appointment of the present Chief Justice, by an order of the Court dated December 17, 1888, STEPHEN J. FIELD, Associate Justice, was allotted to the Ninth Circuit (128 U. S., App., p. 701).

Circuit Courts shall be held by the Circuit Justice, or by the Circuit Judge of the circuit, or by the District Judge of the district, sitting alone, or by any two of the said judges sitting together (R. S., sec. 609).

It shall he the duty of the Chief Justice and of each Justice of the Supreme Court to attend at least one term of the Circuit Court, in each district of the circuit to which he is allotted, during every period of two years (R. S., sec. 610).

Circuit Courts are by law to be held at Los Angeles, in the Southern District, and at San Francisco in the Northern District of California (24 Sts., 308, ch. 928, *supra*).

On the 14th day of August, 1889, at the time and place of the attack upon him by Terry, Mr. Justice FIELD was proceeding by the most direct and expeditious route and mode from Los Angeles, in the Southern District, where he had held court and pronounced a judgment the day before, to San Francisco, in the Northern District, where he had an appointment to sit with the Circuit Judge, in a case assigned for the next day.

He was, therefore, at the time and place of the attack, *in the direct and immediate discharge of his official duties —just as much so as if he had been sitting in court in San Francisco.*

In this situation, the Constitution guaranteed to him the same protection to which he would have been entitled had he been in a United States Court House holding court. No power or person in California could obstruct his progress for a moment on his circuit, or destroy, or mutilate, or wound his person, and so impede or retard that progress, and the performance of his duty, without

violating the Constitution of the United States, "by obstructing its authorized officer against his will, and hindering him in the performance of the duty imposed upon him by law."

We submit, therefore, that Mr. Justice FIELD in defending himself, and whoever came to his aid necessarily to protect and shield him in the discharge of his duty, in his progress on his Circuit, whether at his request or as a volunteer, were doing something more than exercising the natural or common law right and duty of defending the body of the man, Stephen J. Field, and were acting under Federal authority, and doing an act required at their hands by the Constitution and laws of the United States.

Suppose a mail carrier, attacked by a highwayman, who stops the mail with intent to rob it, and threatens his life, drives over or shoots down the assailant. Is not his act clearly done under Federal authority and in pursuance of a law of the United States? And yet there is no statute but that under which he is authorized and required to carry the mail safely to its destination, like the statute which authorized and required Mr. Justice FIELD to proceed upon his Circuit and dispense justice in the Court at San Francisco.

Or suppose a military or naval officer of the United States necessarily shoots a subordinate in the suppression of a mutiny, would he not be doing an act pursuant to a law of the United States under which he holds his commission, although there were no statute covering the case in hand?

We submit that nothing can be clearer than that, if Mr. Justice FIELD himself had taken the life of Terry necessarily in the defense of his own, in the maintenance and protection of his right and duty to proceed upon his Circuit and administer justice at San Francisco, the Constitution and the laws already cited imposing that duty upon him would have brought his case, beyond all question, within section 753 of the Revised Statutes.

It will be remembered that Mr. Justice FIELD was himself arrested on the same charge of murder, and released

under *habeas corpus*, and that the prosecution by the State was abandoned on the declaration of the Governor that to pursue it would be a burning disgrace to the State.

And Neagle, as a mere bystander, as a citizen owing allegiance and fidelity to the Constitution, was not only authorized but bound to protect the Judge, who by his position was wholly disabled from protecting himself; and his act is exactly of the same nature, and comes as clearly within section 753, as the same act by Mr. Justice FIELD, under the same circumstances and for the same purpose, would have done.

Mr. Justice FIELD, being by his posture disabled, had a right to call upon Neagle to protect him. Neagle was accompanying him, with his express consent, for that very purpose.

Homicide, necessarily committed by a bystander for the prevention of a felony, is not murder, not a crime, but justifiable; and when it is committed, as under the circumstances of this case, to prevent the murder of a Federal Judge, and so to protect him in the performance of official duty required of him by the Constitution and laws, it necessarily is an act done pursuant to a law of the United States.

Wharton's Crim. Law §§ 495–501.

We submit, therefore, with entire confidence, that, if Mr. Justice FIELD had done this act necessarily in protecting himself in the discharge of his official duty, it would have come within the category of section 753 of the Revised Statutes; and that Neagle's act does so, on the same principles and for the same reasons.

Fourth Point.

But to Neagle's right and duty, as a bystander and citizen, to protect Mr. Justice FIELD, *is to be added his official*

authority and duty conferred and imposed upon him by Acts of Congress as a United States Deputy Marshal, attending the Justice on his circuit, within the district of which he was Marshal. Thus acting under Federal authority, and in pursuance of the statutes under which he was appointed, his act in protection of the Justice was clearly within the category of section 753 of the Revised Statute, "Done in pursuance of a law of the United States."

Conceding that Marshals must look to the acts of Congress for their powers, these are ample to cover the above proposition.

Section 787 of the Revised Statutes declares that—

> "It shall be the duty of the Marshal of each district to attend the District and Circuit Courts when sitting therein, and to execute throughout the district all lawful precepts directed to him and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty."

By section 788—

> "The marshals and their deputies shall have *in each State* the same powers in executing the laws of the United States as the sheriffs and their deputies in such State may have by law in executing the laws thereof."

Section 780 provides that—

> "Every marshal may appoint one or more deputies who shall be removable from office by the Judge of the District Court, or by the Circuit Court for the district, at the pleasure of either."

The Political Code of California defines the powers which sheriffs have as follows:

> "§ 4176. The Sheriff must—
> 1. Preserve the peace.
> * * * * * * *

3. Prevent and suppress all affrays, breaches of the peace, riots and insurrections which may come to his knowledge.

4. Attend all courts * * * at their respective terms held within his county, and obey their lawful orders and directions." * * *

"§ 4193. The Sheriff must perform such other duties as are required of him by law—"

All which provisions are re-enacted, as to sheriffs of counties, by "An Act to establish a uniform system of county and township governments," passed March 14, 1883 (chap. 75, Statutes of Cal., of 1883, p. 320).

And the Penal Code of California provides—

"§ 197. Homicide is also justifiable when committed by any person in either of the following cases:

1. When resisting any attempt to murder any person or to commit a felony, or to do some great bodily injury upon any person, or

2. When committed in defense of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a felony. * * * *

4. When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace."

As we have already shown (p. 3 of this Brief), it has been decided by the Supreme Court of California that the Code must not be regarded as embodying the whole law of the State respecting subjects treated in it; that it is to be liberally construed; that the rule of the common law, that statutes in derogation thereof must be strictly construed, has been abolished there; but that where the Code is silent the common law governs.

Especially must this be so in regard to the undefined duties of an office originating in the common law, like that of sheriff.

There were such duties originating and perpetuated in ancient historical usages.

Macaulay, Vol. I., p 223, describing England beyond the Trent, as late as the accession of George III., says:

> "The Judges on circuit with the whole body of barristers, attorneys, clerks and serving-men rode on horseback from Newcastle to Carlisle, armed, and escorted by a strong guard under the command of the Sheriffs."

Dalton, (Office of Sheriffs [London, 1682], ch. 98, entitled, "The Sheriff is to be attendant upon the Judges in their Circuit,") says:

> "Note that the counties of this realm are divided into six circuits—and two learned men are assigned by the King's commission to every circuit to ride twice a year through those shires allotted to that circuit.
>
> "And the Judges of Assize allotted to every circuit do use to make proclamation aforehand, a convenient time in every county of their coming into the county, and the time and place of their sitting.
>
> "And at that time all the causes of the county are brought before them by the parties grieved."
>
> "Also the High Sheriffs themselves of every shire are in person to attend upon the Justices or Judges of the Assizes and jail delivery in (*and through*) their circuits, and shall give their attendance for the due executing of the commandments and precepts of the said Judges in the matter concerning the execution of their offices and the administration of justice.
>
> "And the Judges of Assize may fine the High Sheriff, and other the said officers if they fail either in their attendance or for any other negligence, in their office before them. 'Yea, by some opinions the Sheriff in every shire through the circuit is to attend in person, or by a sufficient deputy allowed by the Judges, all the time that they be within the county, and the Judges may fine him if he fail,' Bacon V., 26; *Tamen aliter in usu.*"

And at least one member of this Court will remember that, until very recent times, the Sheriff of the county always personally attended the Judges of the Supreme Judicial Court of Massachusetts, on circuit, escorting them from their lodgings to the Court House and back again, armed with his staff of office, as a body guard, a custom that is believed to have come down from the earliest days of the Colony, and to have been brought over from England.

The evidence in the record shows that Mr. Justice FIELD himself arranged with Neagle to accompany him, for his protection, from San Francisco to Los Angeles and back, supplying him for the purpose with a sleeping-car section opposite to his own.

Under these statutory provisions, then, we claim that there was ample Federal authority for Neagle, by virtue of his office of Marshal, attending Mr. Justice FIELD for his protection at his request, on the necessary journey through his circuit, and at any rate being present when Terry attacked him, to keep the peace and prevent the threatened felony by all necessary means and with all necessary force.

These statutes certainly constituted Neagle a peace officer, to keep the peace of the United States when it was broken by the attack on Mr. Justice FIELD.

That, under such circumstances or similar ones, there is such a thing as "the peace of the United States," and that the Marshal and his deputies are the proper arm of the Federal Government to maintain it, seems to have been definitely settled by this Court in *Siebold's Case, ut supra.*

There the Act of Congress provided for the regulating of elections at which members of Congress were to be elected, and required supervisors to attend the polls and the Marshals and their deputies to "keep the peace," and "to preserve order" at the polls. There, to the objection urged

in argument that the duty of "keeping the peace on the soil of the State belonged to the State authorities, and that the preservation of peace and good order in society is not within the powers confided to the Government of the United States," this Court used the emphatic language, part of which has already been quoted (100 U. S., p. 394):

> "Here again we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it to be an incontrovertible principle that the Government of the United States may by means of physical force exercised through its official agents execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

And after pointing out and analyzing the distinction between that absolutely exclusive jurisdiction which the United States has over the District of Columbia and over those places in the States which have been ceded to it for its uses by them, and the concurrent jurisdiction which it has in the States, in all places where it has to exercise its own powers and functions, the Court proceeds (100 U. S., p. 395):

> "Without the concurrent sovereignty referred to the National Government would be nothing but an advisory government. Its executive power would be absolutely nullified.
>
> "Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform if they cannot use force? In executing the processes of the courts must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take

its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these and keep on refining and re-refining we shall drive the National Government out of the United States and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation.

"The argument is based on a strained and impracticable view of the nature and powers of the National Government. It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And to do this it must necessarily have power to command obedience, preserve order and keep the peace, and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. *Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand.*

The duty imposed upon the Marshal of each District by section 787 of the Revised Statutes—"*to attend the Courts while sitting therein*"—is not satisfied by a mere formal attendance upon the judges while on the bench. It extends to the whole term of the Court while it is in session in the District, and can fairly be construed to require him to attend the judge of either Court on his way to the Court to perform his duty.

Besides, the Marshal is the only executive officer of the United States in his District. He is recognized as such by all Acts of Congress providing for the performance of executive duties in the District. And he is repeatedly recognized as being in command of the "*posse comitatus* of the District," and, as he has the same power as the Sheriff, he may assemble the *posse comitatus* of the District to keep the peace.

Referring to the right of the Sheriff and his officers to take the *posse comitatus*, and to the character of the *posse* itself, Dalton says (chap. 95, p. 355):

> "And in such cases they are not appointed any number, but *it is referred to the discretion of the sheriff, &c., what number they will have to attend upon them, and how, and in what manner they shall be armed, weaponed, or otherwise furnished.*"

Again (p. 355):

> "The Sheriff also may take *posse comitatus* (*any number that he shall think meet*) to pursue, apprehend, arrest, and imprison Traytors, Murderers, Robbers, and other felons, *or such as do break, or go about to break, or disturb the King's peace.*"

> "Note, that the Sheriff or his officers may take the power of the County by force of the *common law*, and that the Statute of Marl., cap. 21, & Westm. 1, cap. 17, & Westm. 2, cap. 39, are but a confirmation of the common law, for the taking of the power of the County by them, *and that as well for the safeguard of their persons*, as to execute the King's writ, and commandment by writ."

He may, by proclamation, require all persons to go with him—

> "for the apprehending of Traytors, or Felons, suppressing of Rioters, pacifying of an affray, *or the like, or in any other thing belonging to his office, where he shall find a resistance.*"

If the sheriff or his officers take the *posse comitatus* with them—

> "*without any sufficient cause*, yet such as therein shall be aiding to the sheriff, or his said officers, or servant, *may well justifie such their doing by the commandment of the sheriff*, or his said officers, &c." (p. 356).

Here, again, we may find ample power in the Marshal, as such, to employ and use Neagle to keep the peace, in protecting Mr. Justice FIELD.

Theoretically the judicial power simply consists in *declaring* what right and law is. Of itself it has no power

to execute its own decrees, still less to defend itself against violence. In both these particulars the executive power is obliged to lend it its aid. Hamilton says in the 78th Number of the *Federalist*:—

> "The judiciary has no influence either over the sword or the purse; no direction either of the strength, or of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

The usual method by which protection has been extended to the Courts to enable them to perform their duties in the Government out of which ours grew was through the instrumentality of the Sheriff, who, in the origin of the office, and probably still, is an *executive* officer. The Marshal in our Federal system is the Sheriff; and considering that Congress has provided for the appointment of Marshals, it must necessarily be understood that those Marshals are clothed with the traditional powers which they have always exercised in respect to the administration of justice. We cannot suppose that Congress has been ignorant of the traditional function and authority of Sheriffs and Marshals. When, therefore, it has provided for the appointment of Marshals, without particular specification of their duties, it must, first of all, be understood that they are to exercise the traditional duties of that office without which there can be no performance of the judicial function.

In this, as in many other particulars, a law of the United States must be held to include as a part of itself all that it *necessarily* implies. What the powers and duties of *Judges* are is nowhere specifically pointed out by any law. It is enough that the provision is made for their appointment and for the exercise by them of the judicial power. All the rest is necessarily implied.

Fifth Point.

But, if more be needed to demonstrate that Neagle, in protecting Mr. Justice FIELD, *was discharging a duty imposed upon him by Federal authority, or, in other words, was acting in pursuance of a law of the United States, it is to be found in the order of the Attorney-General, which is conclusively presumed to have been the order of the President, commanding the performance of that duty.*

We live under a government of laws and not of men, and can claim no authority or power for the President, or for any executive department, not conferred upon them by law. What we assert is, that it is not only within the lawful power, but is the plain duty of the President, when informed that the due and regular administration of justice, on one of the Federal Circuits, is about to be interfered with by a threatened attack on the Federal Judge, assigned by law to administer it, and actually engaged in that service, to provide, by adequate means, for his protection.

That the power and duty of protecting the agents and officers, by and through whom alone its governmental functions can be exercised, does reside somewhere in the government of the United States, has already been demonstrated. Indeed, it has uniformly been held by this Court to be an essential element of that absolute sovereignty, within the scope of its powers, which it has always asserted and maintained for the United States, upon the obvious principle that, without the power so to protect its officers and agents, real sovereignty cannot exist.

The claim is now made that, without a positive and explicit act of Congress providing for the particular case, this necessary power of protection, which is conceded to reside somewhere in the government, cannot be exercised, and that consequently the administration of justice and

every other governmental function must be left to be hindered and prevented by violence, and that it is permissible neither for the Court, with the aid of its officers, to protect itself in such an emergency, nor for the executive department of the government to come to its rescue.

We have already attempted to show that, under the existing laws of the United States, it is entirely competent for the Court and the Marshal to use the necessary force for self-protection. We now contend, further, that, under the same laws, it is also competent for the executive department, without a special act of Congress for the particular case, to extend the same protection, and that it would fall short of its duty, if it should fail to do so.

In *Osborn* vs. *Bank of the United States*, 9 Wheat., 738, in answer to the contention that, admitting the power of Congress to protect the bank as a governmental agency, from State taxation or any other control or interference, this exemption ought to have been *expressly* asserted in the act of incorporation, and, not being so expressed, ought not to be implied by the Court—

MARSHALL, *Ch. J.*, said (at p. 865):

> "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply without expressing this very exemption from State control which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty, and yet this protection is not expressed in any act of Congress. It is incidental to and is implied in the several acts, by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is,

> the judicial power is the instrument employed by the Government in administering this security."

How strange would it be, then, if the judicial power, and the Courts and Judges in whom that power is embodied, being the instruments employed by the government for securing necessary protection to all its other agents, should be found to have been themselves left wholly unprotected by the laws, and hopelessly exposed to every shock of violence.

The Constitution (Art. II.) vests the executive power in the President, prescribes the oath to be taken by him before entering on the execution of his office, "To protect, preserve, and defend the Constitution of the United States"—and provides that *he shall take care that the laws shall be faithfully executed.*

This wholly undefined and undefinable power, thus vested in the President, this constitutional power and duty inherent in him, to take care that the laws be faithfully executed, cannot be absolutely and wholly dependent for its exercise upon the will of Congress, nor must it wait, in each particular case or emergency, for a specific act of Congress to provide the means and method of its exercise. If that were so, it might as well not exist at all. A power and duty that cannot be exercised and discharged is no power or duty at all.

In time of civil war, this "executive power" was found to be sufficient, when necessary, for the suppression of the rebellion, and for conferring liberty upon four millions of slaves.

When, during hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was annually passed, Chief Justice MARSHALL was (at p. 160)—

> "by no means clear that the President of the United States, whose high duty it is to 'take care that the

> laws be faithfully executed,' and who is Commander-in-chief of the armies and navies of the United States, might not, *without any special authority for that purpose*, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States to seize and send into port for adjudication American vessels which were forfeited by being engaged in this illicit commerce."
>
> *Little* v. *Barreme*, 2 Cranch, 157.

As soon and as long as there are laws of the United States to be executed, this power and duty are inherent in the President. As soon as the laws had established the Courts and defined the judicial circuits, and assigned judges to go upon those circuits for the purpose of carrying and dispensing justice to the people at their homes, the power and duty became vested in him to see that those laws were faithfully executed. And who will say that, to use the language of Chief Justice MARSHALL, "without any special authority for that purpose," he might not and must not, upon being advised that a Federal judge, going upon his circuit in the actual discharge of his official duty, was about to be assassinated in time of peace, send an officer to protect him, and so take care that the laws for establishing and administering justice should be faithfully executed? If he heard that the Chief Justice of this Court, on his way from Chicago to Washington to open the Court, was about to be attacked and murdered, would the President discharge his constitutional duty, if he left him unprotected? Might he not lawfully order the Marshals of all the districts, through which he was to pass, to protect him?

We submit that there are many cases of unexpected emergencies in which Congress, from the mere fact of their being unforeseen, has failed to prescribe the means and the method by which the President shall exercise this power, in which, nevertheless, it is still inherent in him, and absolutely incumbent upon him to exercise it, even if he has to look subsequently to Congress to cover the necessary expenses incurred in its exercise.

For instance, in this very matter of taking care that the due course of justice, under the laws of the United States, should not be impeded or obstructed, Congress, foreseeing from past experience that insurrection, domestic violence, and unlawful combinations or *conspiracies* might impede or obstruct it, and recognizing the necessity of prescribing ample means and a proper method for the President to discharge his constitutional duty in the premises, provided (R. S., sect. 5299) that—

> "whenever any such insurrection, violence, unlawful combination or conspiracy opposes or obstructs the laws of the United States, or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the president, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, *or by other means, as he may deem necessary*, for the suppression of such insurrection, domestic violence, or combinations."

Can it be that, in emergencies of less magnitude, by which the laws of the United States, or the due course of justice under the laws of the United States, shall be hindered or obstructed by violence, the President, who is still charged with the duty of preventing such hinderance or obstruction, is prohibited from discharging such duty, because Congress, not being able to foresee the particular emergency, and so to provide for it, has failed to prescribe the particular *means and method* of his so doing?

May he not in case of threatened assaults upon the courts and judges give lawful and authoritative instructions to the Marshall to prevent them?

But we insist that there are general acts of Congress entirely sufficient to authorize the President in the case in hand to provide for the appointment and employment of Neagle, under special instructions, to protect Mr. Justice FIELD, while on his circuit, from the threatened violence of the Terrys.

As to the vast multiplicity of matters involved in the administration of the executive business of the Government, it is physically impossible for the President to give them his personal supervision. Of necessity he must, as to such matters, discharge his duty through the instrumentality, or by the agency of others. And for this purpose the several executive departments have been created.

McElrath vs. *United States*, 102 U. S., 426.

The acts and orders of these departments, within the scope of the executive duties committed to their charge, are *conclusively presumed to be the acts and orders of the President.*

Runkle vs. *U. S.*, 122 U. S., 543, at p. 557.

The powers vested by law in the Department of Justice, and exercised by the Attorney-General, are ample to warrant the executive order issued by him, and make all acts done necessarily by Neagle in pursuance of that order, "acts done in pursuance of a law of the United States," within the meaning of section 753 of the Revised Statutes.

It was only after the outbreak of the Civil War, whereby the administration of justice by the Federal Courts was thrown into confusion, that Congress passed the Act of August 2, 1861 (12 Stat., 285; R. S., sec. 362)—

> "The Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the Districts in the United States * * as to the manner of discharging their respective duties; and the said district attorneys and marshals are hereby required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct."

By the Act of June 22, 1870 (16 Stat., 163), an executive department of the Government of the United States was

established, to be called the Department of Justice, of which the Attorney-General was to be the head.

And by section 8 the Attorney-General is—

> "empowered to make all necessary rules and regulations for the government of said department of Justice, and for the management and distribution of its business" (R. S., sec. 161).

The effect of these acts must necessarily have been intended by Congress to vest in the Attorney-General a large and responsible discretion, in directing the performance of duties by Marshals, and may well be construed to authorize their employment, under his direction, in just such duties as were imposed by the Attorney-General upon Neagle. War had broken out; States had attempted to secede; and the judges, officers, witnesses, and parties in the Federal Courts were exposed to threats and danger of disturbance and violence. Hence the need of this new scheme of supervision and direction of the Marshals in the performance of their duties, by a competent executive department representing the President, who was to take care that the laws were faithfully executed.

To say that he was only to order and direct the performance of duties "specifically defined by the statutes," would be substantially to nullify the effect of the Act of 1861. It was because the occasion of the rebellion demanded supervision and direction, by a central and competent head, of the Marshals and District Attorneys, as the executive officers of the United States in their respective Districts, in the discharge of the undefined duties incidental to their offices, as representing the executive power, that this new and enlarged power must have been conferred upon the Attorney-General.

And especially since the erection of his office, by the Act of 1870, into an executive department, is this undefined and general power of superintendence and direction of the subordinates in his department, as to the duties to be performed by them, necessarily inherent in him as the

head of the department, carrying with it a large discretion, not to be denied or controlled by the Courts, unless it leads him to the direction of acts inconsistent with law.

The same rules as to the exercise of this discretion, which have uniformly been applied to the other executive departments, are now applicable to the Department of Justice.

In *U. S.* vs. *Macdaniel*, 7 Pet., at p. 14, McLEAN, *J.*, says (at p. 14):

> "A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law: *but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles.* To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government." * * * * *

The duties discharged by the defendant, the learned Judge further said—

> " were required of him by the head of the department, and, being a subordinate, he had no discretion to decline the labor and responsibility thus imposed. * * * *
>
> "*But it is said there was no law authorizing such an officer to be appointed.* * * *
>
> "*It must be admitted that there was no law* authorizing the appointment of the defendant, nor was it considered necessary that there should be a special statutory provision on the subject."

Again, in *Decatur* vs. *Paulding*, 14 Pet., 497, TANEY *Ch. J.*, said (at p. 515–516):

> "The duty required by the resolution was to be performed by him [the Secretary of the Navy] as the head of one of the executive departments of the government in the ordinary discharge of his official duties. In general such duties whether imposed by Act of Congress or by resolution are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. * * * If he doubts, he has a right to call on the Attorney-General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments as well as for the President, unless their duties were regarded as executive, in which judgment and discretion were to be exercised. * * * * * *
>
> "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

Vide also—

6 Opin. Att'y-Gen'l (CUSHING), 341, 342, 346.

That the executive may lawfully instruct the Marshal, as to the performance of duties not specifically defined by law, has long been recognized by the courts and acted upon by the government.

Attorney-General WM. WIRT, 1 Opin. Att'y-Gen'l, 475, said:

> "I have no doubt that the Marshal, under the orders of the President, may remove the intruders on the lands set apart for the cultivation of the vine and olive in Mississippi, no title to those lands either at law or in equity having yet passed from the United States. *The instructions to the Marshal must proceed from the President.*"

Certainly there was no law specifically directing the Marshal to remove the intruders, or authorizing the President to direct him to do so. But the act of the Marshal was done in pursuance of the law of the United States, because it was within the constitutional power of the President to take care that the law for the restoration of the lands was properly executed.

The Act of July 17, 1862 (12 Stat., 589), entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes," made it the President's duty to "cause the seizure of all the estate and property" of rebels and apply the same to "the support of the Army of the United States," but it did not refer to the Marshals, nor prescribe how the President should effect the seizure. The President, believing that the Marshal, acting under the Attorney-General's direction, was the proper party to make the seizure, although there was no law specifically imposing such duty on the Marshal, caused the Attorney-General to direct the Marshal to seize the property of *John Slidell*, and this Court sustained the seizure.

Confiscation Cases, 20 Wall., 92.

STRONG, *J.*, there said (at pp. 108–109):

> "It is said this exhibits no authority given by the President for the seizure, and that the Attorney-General was not empowered to direct it. But if the seizure was made by virtue of the Act of Congress, as the information avers it was, it was necessarily caused to be made by the President, for he only was empowered by the act to cause it. Then the Attorney-General must have been *the agent* of the President *to give instructions* to the District Attorney, and, through him to the Marshal. The language of the statute * * * implies that the seizure is to be made by the agents of the President. And *a direction given by the Attorney General to seize * * * must be regarded as a direction given by the President.*"

The vast and necessary discretion vested in the Attorney-General, as head of the Executive Department of Justice, is nowhere better illustrated than in the case of *U. S.* vs. *San Jacinto Tin Co.*, 125 U. S., 273—a suit brought by the Attorney-General, in the name of the United States, to set aside a patent for land issued in its name, on the ground that it was obtained by fraud. It was denied that the Attorney-General had any legal authority, under the Constitution and laws of the United States, to commence such a suit, and no specific authority could be found in the statutes; but his authority to do so was held to be implied by section 346 of the Revised Statutes, making him the head of the Executive Department of Justice, and from the authority given him to supervise the conduct of all suits brought by or against the United States, and to give advice to the President and the heads of departments, and also from the powers exercised by the Attorney-General in England, when the Judiciary Act of 1789 created an officer by the same name for the United States.

MILLER, *J.*, said (p. 279):

> "*Notwithstanding the want of any specific authority* to bring an action in the name of the United States to set aside and declare void an instrument issued under its apparent authority, we cannot believe that, where a case exists in which this ought to be done, it is not within the authority of that officer to cause such action to be instituted and prosecuted. * * * *That such a power should exist somewhere*, and that the United States should not be more helpless in relieving itself from frauds, impostures and deceptions than the private individual, is hardly open to argument. The Constitution itself declares that the judicial power shall extend to all cases to which the United States shall be a party, and that this means mainly where it is a party plaintiff is a necessary result of the well-established proposition that it cannot be sued in any court without its consent. There must, then, be an officer or officers of the Government to deter-

> mine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States, in every judicial district, are officers of this character; and they are, by statute, under the immediate supervision and control of the Attorney-General. How, then, can it be argued that if the United States has been deceived, entrapped or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effects of such instrument, thus fraudulently obtained, *without a special Act of Congress in each case*, or without some special authority applicable to this class of cases, while all other just grounds of suing in a court of justice concededly belong to the Department of Justice, and are in use every day?"

The Court further relies upon the original creation of the office of Attorney-General, without any very accurate definition of his powers, by the general words of the Judiciary Act of 1789 (p. 280) which—

> "must have had reference to the similar office, with the same designation, *existing under the English law*. And though it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law. In all this, however, the Attorney-General acts as the head of one of the executive departments, *representing the authority of the President*, in the class of subjects within the domain of that department and under his control."

To the obvious argument against raising such a vast power by implication in an executive department, the Court further said (p. 284):

> "We are not insensible to the enormous power and its capacity for evil thus reposed in that department of the Government. Since the title to all the land in more than half of the States and Territories

> of the Union depends upon patents from the Government of the United States, it is to be seen what a vast power is confided to the officer who may order the institution of suits to set aside every one of these patents; and if the doctrine that the United States in bringing such actions is not controlled by any statute of limitations, or governed by the rule concerning laches be sound, of which we express no opinion at present, then the evil which may result would seem to be endless as well as enormous. But it has often been said that the fact that the exercise of power may be abused, is no sufficient reason for denying its existence, and if restrictions are to be placed upon the exercise of this authority by the Attorney-General, it is for the legislative body which created the office to enact them."

We submit, therefore, upon the strength of these principles and authorities, that, when the Constitution of the United States, in order to establish justice, vested the judicial power of the United States in this Court and such inferior courts as Congress should create, and when Congress, to carry this provision into effect, created the circuits, and fixed the times and places of holding the Federal Courts therein, and caused the Justices of this Court to be assigned to their respective circuits, and required them to go upon such circuits to dispense justice to the people, these provisions of the Constitution and laws necessarily implied that, in the discharge of the duties so imposed upon them, they should be absolutely protected by the government, whose servants they are, and whose sovereignty they represent—that no other power, governmental, corporate, or individual, should be permitted, for one moment, or in any place, to hinder or interfere with the discharge of their judicial duties—and that, without a special act of Congress in each case, and without any special authority applicable to this class of cases, the general laws creating them and imposing their duties upon them effectually guarantee to the judges the protection of the government. And it must also be true that, when the Constitution vested the "exe-

cutive power" in the President, and required him "to take care that the laws be faithfully executed," and the Congress, to carry these provisions into effect, created an executive department of justice, and Marshals for each district, and gave to the Attorney-General, as head of that department, general supervision of the Marshals in the performance of their duties, and invested the Marshals with the general and undefined powers of sheriffs in each State, the power to protect the Federal Judges, while on circuit in the discharge of their assigned duties, *which power must exist somewhere*, in the absence of any specific enactment by Congress for the particular case, is necessarily vested in the President, and is properly exercised by him through the Attorney-General, in directions to the Marshals, who are the natural and proper representatives of the executive power of the government, in cases where force is to be made use of, as in the case of the protection of Federal Judges from assassination or lesser violence, and that all necessary acts of the Marshal, done under such orders, are acts done in pursuance of a law of the United States.

One more express provision of the statute enforces this conclusion. The amendment, by the Act of 18th February, 1875 (18 Stat., 318), added to section 846 of the Revised Statutes, this clause:

> "That where the ministerial officers of the United States have or shall incur extraordinary expenses in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof under the special taxation of the District or Circuit Court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the Judiciary."

Clearly this enactment contemplates extraordinary emergencies, not contemplated or provided for by existing statutes, for the employment of Marshals under authority of the President, for which emergencies provision is here made.

All the routine duties and ordinary services of Marshals in executing the laws of the United States were already fully provided for by existing statutes.

Sections 829–834 of the Revised Statutes cover with extreme definiteness and particularity all these, but Congress, foreseeing that sometimes extraordinary services might be called for, wisely placed in the hands and control of the President this additional means of procuring and paying for them, to which he properly resorted in this instance.

In *Wells* vs. *Nickles*, 104 U. S., 444, where the Interior Department, apparently without any authority from Congress, had appointed a large number of timber agents in the Land Department and given them instructions to seize timber, this Court held that the *appropriation of money by Congress* to pay them was a recognition by Congress of the validity of their appointment.

MILLER, *J.*, said (at p. 447):

> "The effort we have made to ascertain and fix the authority of these timber agents *by any positive provision of law has been unsuccessful.*
>
> "The Department of the Interior, under the idea of protecting from depredation timber on the lands of the Government, has gradually come to assert the right to seize what is cut and taken away from thom wherever it can be traced. In aid of this, the registers and receivers of the land offices have, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. If any authority from Congress to do this was necessary, *it may be fairly inferred from appropriations made to pay for the services of these special timber agents.*"

Having thus shown it to be within the discretion, and so the duty, of the President, represented by the Department of Justice, to provide against the emergency created by the threats of the Terrys, it only remains to be established that his express order, through the Attorney-

General, covered the case, and not only permitted, but required, Neagle to use such force as was necessary for the protection of Mr. Justice FIELD at the time and place where the homicide was committed.

It will be noted that the first letter of instructions from the Attorney-General to the Marshal, under the date of April 27th, 1889 (Rec., p. 344), referred to the case of the Terrys in the Circuit Court, and only extended to the exercise of—

> "unusual caution in case further proceedings shall be had *in that case*, for the protection of his Honor Justice Field, or whoever may be called upon to hear and determine the matter."

But the replies of the Marshal and the District Attorney, to whom he was directed to submit his letter of instructions, clearly pointed out to the Attorney-General that the protection of the Judge in Court was by no means all that the occasion required (Rec., p. 345). The Marshal, in answer, called for—

> "two or more detectives to assist in the case, and *also to assist me in protecting Justice Field while in my district.*"

And the District Attorney still more explicitly says that—

"*there is just reason* in the light of the past and the threats made by Judge and Mrs. Terry against Justice Field and Judge Sawyer, *to apprehend personal violence at any moment and at any place, as well in Court as out of Court*, and that while due caution has always been taken by the marshal whenever either Judge or Mrs. Terry is about the building in which the Courts are held, he has not felt it within his *authority to guard either Judge Sawyer or Justice Field against harm, when away from the Appraiser's building.*"

The final letter of instructions from the Attorney-General of May 27th (Rec., p. 347), referring to the corre-

spondence containing this explicit demand for the authority and the means to protect Mr. Justice FIELD while in the District, in Court and out of Court at any time and place, directs the employment of special deputies for the needed service, to be paid as provided in section 846 of the Revised Statutes. This can only be construed as an express executive order, under the authority of the President, to the Marshal, and the special deputy selected, to use all necessary force to protect Mr. Justice FIELD while in the district.

The explicit instructions of the Marshal to Neagle after he was sworn in, which have already been quoted (p.), are in exact conformity with the executive order, and place him by the side of Mr. Justice FIELD at Lathrop, a place within the Northern District of California, as the duly commissioned agent of the President, charged with the duty of protecting the person of the Judge.

We have thus attempted to show that Neagle, whether as a citizen and bystander, acting under his duty as such and in the right of Mr. Justice FIELD himself, or as Marshal discharging the duty vested in him by his office, or as the delegated agent of the President, acted under Federal authority, and "in pursuance of a law of the United States," in using whatever force was necessary for the protection of Mr. Justice FIELD.

So that the only question that remains is, whether the killing of Terry was, under the circumstances, necessary to such protection.

Sixth Point.

The Court below did not err in holding that Neagle used no more force than was necessary in protecting Mr. Justice FIELD, *and that he was therefore entitled to his discharge from custody "for an act done under a law of the United States."*

A.

We believe it to be a well-settled rule of practice in this Court that points not taken in the Court below, but raised for the first time here, cannot be made the ground of a reversal.

Wilson v. *McNamee*, 102 U. S., 572, 574.
Morrill v. *Jones*, 106 U. S., 466, 467.
Springer v. *U. S.*, 102 U. S., 586, 593.
Clark v. *Fredericks* 105 U. S., 4.

If this be so, the argument is already concluded, for no such question was raised by the appellant in the Circuit Court. He, in fact, expressly waived the question. He not only declined to take part in that inquiry, and absented himself therefrom after announcing his intention neither to produce evidence himself nor to cross-examine the witnesses produced by the petitioner, but expressly planted himself upon his demurrer alone (which perhaps, as matter of law, admitted that no more force was used than was necessary), and upon the question of *jurisdiction* only, and, in his final argument, limited himself to that single question. Thus the question, whether the shooting of Terry in fact involved the use of more force than was necessary for Mr. Justice FIELD'S protection, was expressly waived by the appellant, and need not and cannot be considered here, the judgment of the Circuit Court being necessarily final thereon.

B.

But if this objection can be overcome, and the question of fact is to be here considered, we submit that, upon the uncontradicted evidence contained in the record, the force used by Neagle, which resulted in the killing of Terry, was no more than was necessary in the discharge of his duty under the instructions to protect Mr. Justice FIELD at all hazards, and that therefore the homicide was justifiable.

If the local law of California applies, the question is not open to discussion, for the Penal Code, sec. 197, provides:

> "Homicide is also justifiable when committed by any person in either of the following cases:
> 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or * * *
> 3. When committed in the lawful defense of such person or of a * * * master * * * of such person when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished, * * * or
> 4. When necessarily committed * * * in lawfully keeping and preserving the peace."

Section 198 declares that—

> "A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section * * * is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone."

And by the law as defined in States where the common law prevails—

> "It is well settled that, if a man is attacked, he has a right to defend himself. If the attack is of such a character, and made under such circumstances as to create a reasonable apprehension of great bodily harm, and he acts under such apprehension and in the reasonable belief that no other means will effectually prevent the harm, he has the right to kill the assailant."
>
> *Commonwealth* vs. *Barnacle*, 134 Mass, 215.

The same rule of law is carefully stated in the Federal Courts:

> "To make a homicide justifiable as committed in self-defense, or the defense of a friend fiercely attacked, the danger of death, or of grievous bodily

harm to himself or his friend, must have been apparently imminent, and the slayer's belief as to the character of the danger must have been honest, and founded upon grounds reasonable under the circumstances."

U. S. v. *King*, Circt. Ct., Eastn. Dist., N. Y., 1888, 34 Fed Rep., 302.

All the authorities hold that the test of necessity in self-defense, or in defense of one whom he is bound to protect, is the slayer's own standpoint, and the question always is, whether he, under all the circumstances, acted in the reasonable belief and fear that, if he did not use his weapon as he did, death or grievous bodily harm would come to him, or to the person whom he was bound to protect.

Wharton's Criminal Law, §§ 488–492, and cases cited.

There can be no doubt, upon Neagle's own evidence, which is wholly uncontradicted, that he brings his case within the law of justifiable homicide, as thus laid down.

And all the circumstances in evidence enforce his own conclusion, and constrain the Court to adopt it:

1. All the circumstances of the violent outbreak of both Mr. and Mrs. Terry in the court room, in the presence of Mr. Justice FIELD, in the previous summer.

2. The repeated and continued threats of both to take vengeance upon the Justice—even to the death—from the time of their imprisonment under his order for contempt down to the very time of the fatal journey from Los Angeles.

3. The universal public rumor and expectation of the

assault prevalent throughout California at the time of Mr. Justice FIELD's arrival and Neagle's appointment.

4. The prophetic warning received by the Marshal and communicated to Neagle, that, upon this very trip, the threatened crime was to be committed.

5. Terry's notorious reputation as a desperate and vindictive ruffian.

6. His reputation of always going armed, enforced by his actual use of the deadly knife in Court and his boasts that he always carried it.

7. The great and fearful responsibility resting upon Neagle, under the orders of the Government, to see to it that no harm came to the person of Mr. Justice FIELD.

8. The mode of assault adopted by Terry from behind, and while Mr. Justice FIELD was so seated as to be utterly incapable of self-defonse.

9. The violence of the blows actually inflicted, leaving the Judge in absolute subjection to a third and final assault.

10. Neagle's reasonable belief, from the motion of Terry's arm, that he was reaching for his knife in the pocket where he always carried it, which knife Neagle believed he was about to use.

11. His murderous aspect and expression.

12. His gigantic stature and bodily strength.

13. Neagle's comparative physical insignificance, making his weapon the only means of protection.

14. The apparent need of instant action against such an assailant, under such circumstances.

15. Terry's utter failure to heed his warning to "stop," and that he was an officer.

16. Who will believe that when Terry had once resolved to commit the high-handed and atrocious outrage which he actually did commit, he meant to confine himself to that, and, having done it, to run away? The known character of the man, with the other evidence, make it plain that he expected to meet, and, indeed, intended to provoke, resistance or remonstrance, and to meet either with his accustomed weapons. Neagle had no *posse*, or other aid. The one thing absolutely necessary was to instantly deprive Terry of his power for violence; and Neagle had no means of doing this except by the prompt use of his pistol.

We submit that, measured by any legal standard that can be applied to the facts, we present a case of justifiable homicide; and that any examining magistrate, before whom the case might have come, must, if within his limited power, have been constrained so to hold, and that no crime had been committed.

Upon the case thus presented to it, the Circuit Court had no alternative but to discharge the prisoner from custody.

This is equally so whether the duty and responsibility of the Court making the inquiry upon *habeas corpus* be measured by the common law, or the enlarged limits given to the inquiry by section 761 of the Revised Statutes—

> "*to determine the facts of the case* by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

In the former case, the Court could not look beyond the

commitment and evidence upon which it was based. In the latter, it is required to ascertain, under the pleadings, all the material facts, and thereupon to make its decision.

In *Ex parte Bollman and Swartwout*, 4 Cranch, 75, Chief Justice MARSHALL, having first determined the power of the Court to issue the writ, said (at p. 125):

> "The prisoners having been brought before this Court on a writ of *habeas corpus*, and the testimony on which they were committed having been fully examined and attentively considered, the Court is now to declare the law upon their case.
>
> "*This being a mere inquiry,* which, *without deciding upon guilt*, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial. * * *
>
> "'If,' says a very learned and accurate commentator * * * * '*it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless*, in such cases only is it lawful totally to discharge him.'"

The prisoner had been committed by the Circuit Court upon the charge of treason in levying war against the United States. The Court then proceeds to examine and weigh the whole voluminous body of evidence on which the commitment had been made, and concludes that—

> "*as the crime with which the prisoners stand charged has not been committed, the Court can only direct them to be discharged.*"

Thus, the inquiry, whether or not the crime charged has been committed, does necessarily involve, in a certain way, the question of guilt or innocence, but so it is always involved in the inquiry and decision of the committing magistrate; but, neither at common law nor under the *habeas corpus* provisions of the Revised Statutes, can the proceeding be regarded as any invasion of trial by jury, or as conflicting with the requirement of Article III., Section 2, of the Constitution, that "the trial of all crimes, except impeachment, shall be by jury."

The practice in the Court of King's Bench at common law is thus stated in Wilmot's Opinions, p. 106:

> "If it appears clearly that the fact for which the party was committed was *no crime*, the Court discharges."
>
> "If doubtful whether a crime or not, the Court bails him, or if the offense be not bailable, remands him."

Applying this strictest standard of the common law to the case, the Circuit Court, having clearly ascertained that no crime had been committed, but that the prisoner had simply done an act imposed upon him by the law of the United States, which, therefore, could not, in any view, be any crime against the State of California, properly discharged him as required by the Act of Congress.

As held by this Court in *Ex parte Royall*, 117 U. S., 251, the Circuit Court may have had a discretion at what stage of the proceeding in the State Court to discharge him, whether in advance of indictment or before or after trial, but as the case, being that of "a petitioner in custody by State authority" for an act done in pursuance of a law of the United States, was one of those "cases of urgency involving the authority and operations of the general government," the Court, in exercising its discretion to discharge immediately, followed the frequent precedents of the Courts of the United States in such cases, which were approved by this Court in the case last cited.

And such exercise of discretion as to time is no ground for reversal here.

Ex parte Royall, supra.

Seventh Point.

The clearly ascertained fact of the case, that the petitioner was in custody of a State Court for an act done in

pursuance of a law of the United States, and that he was still an officer of the United States, under obligation to proceed day by day with the discharge of his official duties, shows clearly that he was "in custody in violation of the Constitution of the United States," as provided by the other clause of section 753 of the Revised Statutes, and equally entitled to his immediate discharge on that ground, in the discretion of the Circuit Court, just as Mr. Justice FIELD *himself was entitled to be and was discharged on* habeas corpus.

In *Ex parte Yerger*, 8 Wall., 85, CHASE, *C. J.*, reviewing all the acts of Congress upon *habeas corpus*, concluding with that of 1867, which first extended the jurisdiction to cases of custody in violation of the Constitution or laws of the United States, says (at p. 102):

> "This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the Courts and Judges of the United States, and this tendency, except in one recent instance, has been constant and uniform, and it is in the light of it that we must determine the true meaning of the Constitution and the law." * * *

And the same learned Chief Justice, in *McArdle's Case*, 6 Wall., 318, at p. 325, said, in reference to this clause of the Act of 1867:

> "This legislation is of the most comprehensive character. *It brings within the* habeas corpus *jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction.*"

In this view, it can hardly be doubted that, where a State Court holds in custody, for an act which the law of the United States required him to do, an officer of the United

States charged with the daily performance of important Federal duties, a case is presented of a prisoner held in custody in violation of the Constitution of the United States.

Eighth Point.

The order of the Circuit Court should be affirmed.

JOSEPH H. CHOATE,
JAMES C. CARTER,
Of Counsel for Appellee.

FILED,
MAR 3 1890

In the Supreme Court of the United States.

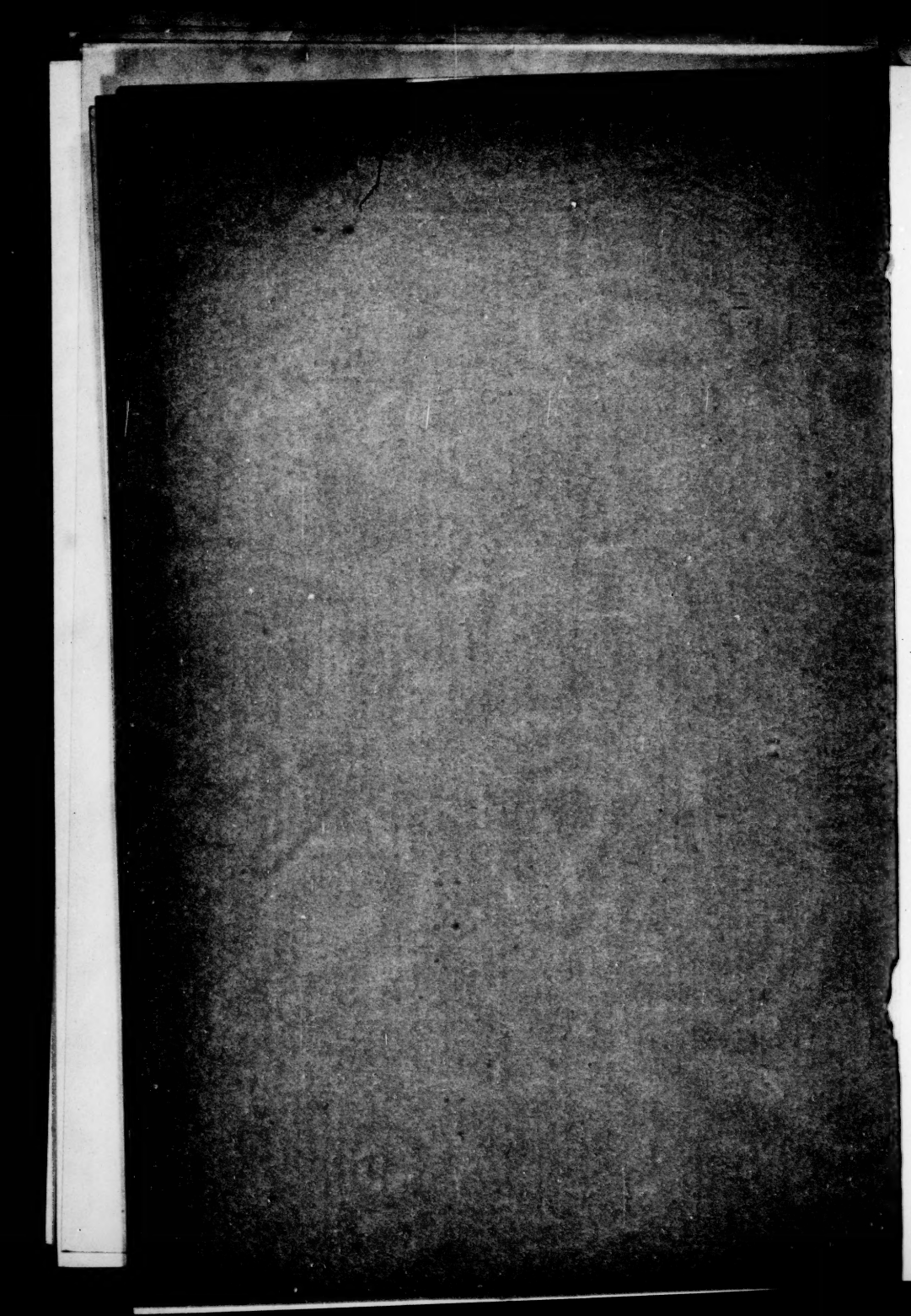
OCTOBER TERM, 1889.

THOMAS CUNNINGHAM, SHERIFF, etc.
vs.
DAVID NEAGLE.
No. 1472.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR APPELLEE.

W. H. H. MILLER,
Attorney-General.



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Having read the briefs of Messrs. Shellabarger & Wilson and of the Attorney-General of California, I desire to make a few suggestions by way of answer.

Substantially the entire argument of each brief rests upon the proposition that there is no power in the executive department to protect a judge in the discharge of his duty unless specific statutory authority to that end has been granted. I say "in the discharge of his duty," because it is too clear for argument that, a judge having held court at one place appointed by law and on his journey thence directly to hold court at the appointed place in another part of his district, is, while so upon his journey, in the discharge of official duty.

I deny the above proposition of appellant *in toto*. I say that it is a heresy, as old as the Government, which has been refuted times without number in the courts, in Congress, and upon the battle-field. It was asserted by one of the most learned of my predecessors, in the famous opinion given to President Buchanan on the 20th of November, 1860; an opinion which is precisely in line with the arguments for the appellant, now under discussion, namely: That the Executive has no power except such as is specifically granted by the legislative department, and was, therefore, powerless to coerce seceding States and peoples; an opinion which for the time completely paralyzed the arm of the Executive in the face of a mighty insurrection, and which, if the policy indicated had not been changed, would have destroyed the Constitution and the nation.

In that opinion may be found all the arguments against the existence of common-law powers, all the talk about sovereign States, and the limitations upon the functions of the Federal Government, which form so large a part of the briefs under consideration. Indeed, the attorney-general of California, on page 37 of his brief, is candid enough to cite as authority for the position he has taken in this case, the decision of Chief-Justice Taney in *ex parte* Merryman (Taney's Circuit Court Decisions, p. 246). In that case a man actively aiding the war against the United States was arrested by military authority in Baltimore, and the Chief-Justice, by a writ of *habeas corpus*, undertook to set him free. The military officer having the prisoner in charge refused to recognize the writ, upon the authority of President Lincoln, by whom it had been suspended

for the time being. In his opinion, as quoted by the attorney-general of California, the Chief-Justice says:

> He, the President, is not authorized to execute them (the laws) himself or through agents or officers, civil or military, appointed by himself; but he is to take care that they are faithfully carried into execution as they are expounded and adjudged by the coordinate branch of the Government to which that duty is assigned by the Constitution.

And he further says, in substance, that the Executive is practically but the ministerial officer of the judicial department, and can do absolutely nothing except in subordination to its mandates. The opinion concludes in the following language:

> In such a case, my duty was too plain to be mistaken. I have exercised all the powers which the Constitution and laws conferred upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation, to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

President Lincoln had different ideas of the functions of the great constitutional department of the Government of which he was the head.

The Constitution provides that before the President enters upon the execution of his office he shall take an oath—

> I do solemnly swear that I will faithfully execute the office of President of the United States and will to the best of my ability *preserve, protect, and defend* the Constitution of the United States.

Standing, on the 4th of March, 1861, upon the steps of this Capitol, confronted by the mightiest rebellion the world ever saw, President Lincoln said to his dissatisfied countrymen:

> You have no oath registered in Heaven to destroy the Government, while I shall have the most solemn one to preserve, protect, and defend it.

He evidently supposed that this oath, embodied in the Constitution, was of some significance, and that being required to take this oath he was invested with some power adequate to the obligation. He understood that to preserve, protect, and defend the Constitution meant to preserve, protect, and defend the Government; and that it was his right and his duty, independently or in the absence of acts of Congress, to use all the power placed at his disposal for the protection and preservation of the Government. I observe that neither one of the arguments filed on behalf of the appellant refers to this clause of the Constitution at all. Has it, therefore, no significance? Does it not by necessary implication invest the President with self-executing powers; that is, powers independent of statute? Is it true that after the inauguration of President Washington and before Congress had

passed any laws, the President had no *authority*, so far as he had the means, to protect the property of the United States? It is certain that he was without any such *authority* if the arguments for the appellant, that he can act only in pursuance of specific acts of Congress, are sound.

One would suppose, reading these arguments, that the only effect of this clause of the Constitution is to impose upon the President the obligation to preserve, protect, and defend the original manuscript copy of the Constitution among the archives of the Government. On the contrary, I maintain that, independently of any act of Congress, the President is bound by this oath, and impliedly thereunder invested with the power to preserve, protect, and defend the institutions of the Government in which the Constitution is embodied; and that no part of these institutions is more sacred or more clearly entitled to such protection than the courts. Let it be borne in mind that, if it be true that nothing but an express provision of the statute can justify the protection of a judge traveling upon official duty, the same rule applies to a court actually in session. If a mob were to attack the United States circuit court sitting in San Francisco, and attempt to kill its judges, it would be just as difficult to find a specific provision of law authorizing the President by the marshals or the military to protect them, as to find such specific provision in this case.

The test prescribed in the argument for appellant, namely, that some specific statute or provision of the Constitution must be found to justify every executive action of the President, would have made unlawful the guarding of the person of President Lincoln as he went to

and fro from the Soldiers' Home during the war, when the air was full of threats of kidnaping and assassination. It would make it unlawful now, if the marshal of the District of Columbia knew that assassins were prowling about Washington with a view to the murder of the President, for him to use his deputies to protect the life of the head of the nation. Or, will it be contended that the marshal may protect the President, or the President may protect himself, but can not protect the courts and judges? In the case under consideration, it must not be forgotten that the threats and attempts upon the life of Mr. Justice Field were based, not upon private animosity, but upon his action as a judicial officer of the Government. It will hardly be questioned that the proper execution of the laws requires that the judges and courts shall be permitted to act without fear, as well as without favor. Is the President taking care that the laws be faithfully executed when he permits courts to be terrorized and judges to be assassinated without raising a hand for their protection?

The act of Terry was in direct and flagrant violation of sections 5518 and 5404 of the Revised Statutes. He was, in the language of the statute, in combination with his wife to injure Mr. Justice Field, on account of his lawful discharge of the duties of his office. For such action he was liable to punishment. Is it true that the law punishes, and impliedly forbids the perpetration of a crime against the Government, and yet knowing that such crime is about to be committed, the Executive has no authority to prevent or to try to prevent it?

Mark, the question now is not as to the jurisdiction of the court to punish for contempts, but of the power of

the Executive to protect the courts against violence and to preserve the existence of the courts and the judges themselves. Nor is the question, whether the United States circuit court would have power to try a man who should murder one of its judges, at all involved. The question is not a question of the jurisdiction of the court to punish criminals, but of the power of the Executive to protect the courts against criminals. In other words, the question reduced to its last analysis is, whether the Executive Department of the Government, which is the only department having physical forces at its command, has the right and is under a duty to use these forces, to preserve, protect, and defend the Constitution and the institutions of the Government in which it is embodied; can the executive branch of the Government, independently of specific acts of Congress, exercise any powers of self-preservation.

We insist that, by the Constitution of the United States, a Government was created possessed of all the powers necessary to existence as an independent nation; that these powers were distributed in three great constitutional departments, and that each of these departments is, by that Constitution, invested with all of those governmental powers naturally belonging to such department which have not been expressly withheld by the terms of the Constitution. In other words, that Congress is invested not only with expressed but with implied legislative powers; that the judiciary is invested not only with expressed powers granted in the Constitution as its share of the Government, but with all the judicial powers which have not been expressly withheld

from it; and that the President, in like manner, by the very fact that he is made the Chief Executive of the nation, and is charged to protect, preserve, and defend the Constitution, and to take care that the laws are faithfully executed, is invested with necessary and implied executive powers which neither of the other branches of the Government can either take away or abridge; that many of these powers, pertaining to each branch of the Government, are self-executing, and in no way dependent, except as to the ways and means, upon legislation.

As to some of these powers the Constitution has left, perhaps has wisely left, the question open, as to which one of the departments shall exercise them, and as to the manner of their exercise. Thus it is provided that the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion and invasion, public safety may require it.

Chief-Justice Taney, as we have seen, was of the opinion that such suspension could only be authorized by act of Congress. President Lincoln, as the head of the Executive Department of the Government, took a different view; and this court, in *ex parte* Milligan, says:

> An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging, and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and the legislature, and not the President, should judge of the political considerations

> on which the right to suspend it rested. The privilege of this writ had never before been withheld from the citizens; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of habeas corpus, whenever, in his judgment, public safety required. (4 Wall., 115.)

The question of the authority of the President to suspend the writ, in the absence of an act of Congress, has never been passed upon by this court, but it thus appears that the executive and the legislative departments of the Government exercised the right. When this court in *ex parte* Royall, and many other cases, holds that the court issuing the writ has a discretion whether it will discharge a prisoner, who in strict law is entitled to such discharge, the judicial department exercises a power for which there is no direct statutory warrant. In practice, each department, in many ways, exercises implied powers for which no specific warrant in Constitution, statute, or treaty, can be found. Exercising such implied power, under the obligation to preserve, protect, and defend the Constitution, and to take care that the laws be faithfully executed, the President, in the case at bar, authorized and directed that protection be extended to Mr. Justice Field while on circuit duty in California. If the President's action, in authorizing such protection to be given, was warranted by the Constitution, then Neagle was acting in pursuance of

the laws of the United States, and is entitled to and will receive vindication at the hands of this court.

If it be said that the executive powers for which we contend are dangerous, the answer is plain.

The President's term is short; by its control of the purse Congress can, in case of necessity, quickly call a halt; he is always subject to impeachment for abuse of his powers; during a hundred years, including two foreign wars and the greatest civil conflict and commotion recorded in history, there has been no attempt at such abuse.

On the contrary, the history of this Government and of every State of the Union shows that there is tenfold more danger that the legislative branch will usurp executive and judicial functions than that either of the latter will trespass on the former.

W. H. H. MILLER,
Attorney-General.

OPINION

OF

The Circuit Court of the United States

FOR THE

NORTHERN DISTRICT OF CALIFORNIA,

IN THE

Matter of DAVID NEAGLE,

UPON HABEAS CORPUS.

DELIVERED AT SAN FRANCISCO, SEPTEMBER 16, 1889,

BY

HON. LORENZO SAWYER,

U. S. Circuit Judge.

In the Circuit Court

OF THE

UNITED STATES.

NINTH JUDICIAL CIRCUIT,

NORTHERN DISTRICT OF CALIFORNIA.

IN THE MATTER OF
DAVID NEAGLE
ON HABEAS CORPUS.

No. 10,469.

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1. Under the provisions of Sections 751, 752 and 753 of the Revised Statutes, the Courts of the United States and their Judges have jurisdiction upon a writ of *habeas corpus*, to inquire into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or omitted in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued—the Constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

2. In the exercise of this jurisdiction, there is no conflict of authority between the State and the United States, the laws of the United States being the "Supreme law of the land," the authority of the State, in such cases, is subordinate, and that of the United States, paramount.

3. A State law which contravenes a valid law of the United States is void. In legal contemplation, there can no more be two valid conflicting laws, operating upon the same subject-matter, at the same

time, than in physics, two bodies can occupy the same space at the same time.

4. The United States is a government, with authority extending over the whole territory of the Union, acting upon the States, and the people of the States. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No State can exclude it from exercising those powers, obstruct its authorized officers, against its will, or withhold from it the cognizance of any subject which the constitution has committed to it.

5. The Constitution and laws of the United States as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its Courts to enforce rights derived thereunder, is as extensive as the territory to which they are applicable.

6. The National Government has power to command obedience to its laws, to preserve order, and to keep the peace, in matters affecting National interests, and no person or power in the land has a right to resist, or question its authority, so long as it keeps within the bounds of its jurisdiction.

7. It is within the power of the Government of the United States to protect all the agencies and instrumentalities necessary to accomplish the objects and purpose of that Government. It is therefore empowered to protect the lives of the Judges of its Courts from assault and assassination on account of their judicial decisions by desperate, dissapointed litigants, not only while actually holding Court, but while such Judges are travelling through their Circuits for the purpose of holding Courts at the different places therein appointed by law for that purpose.

8. An assault upon or an assassination of a Judge of the United States Court while engaged in any matter pertaining to his official duties on account or by reason of his judicial decisions or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the United States Marshal or his deputies to prevent, as a peace officer of the national government.

9. By Section 788 R. S., and the several provisions of the Statutes of California prescribing the duties of Sheriffs by that section made applicable to Marshals, the United States Marshal is made a peace officer, and as such he is authorized to preserve the peace so far as a breach of the peace affects the authority of the United States and obstructs the operations of the government and its various departments. The Courts of the United States must be enabled fully to

perform all the functions imposed upon them by the Constitution and laws without hindrance or obstruction, and they have the inherent power to protect themselves by and through their executive officers under the direction and supervision of the Attorney-General and the President against obstruction and hindrance in the performance of their judicial duties.

10. Where a Deputy United States Marshal, acting under instructions from his superior officers—the United States Marshal and the Attorney-General—in protecting the life and person of a Justice of the Supreme Court of the United States from a murderous assault made on account of his judicial decisions, at the hands of a dissatisfied litigant, finds it necessary to take the life of the assailant and is arrested by the State authorities and held upon a charge of murder for such act, the United States Circuit Court may upon *habeas corpus* discharge such United States officer from the custody of the State authorities, upon it being shown that the homicide was necessary, or that it was reasonably apparent to the mind of the Deputy Marshal, at the time and under the circumstances surrounding him, that the killing was necessary in order to protect and defend the Justice from great bodily injury, or to save his life.

11. The homicide in such case, if an offense at all, is an offense under the laws of the State, and only the State can deal with it *in that aspect*. It is not claimed to be a crime punishable under the laws of the United States. But the homicide, when necessarily done by a Deputy Marshal in the performance of his duty in protecting the life and person of a Justice of the United States Supreme Court from assault and violence because of his judicial decisions, is an "act done in pursuance of a law of the United States," and is not and cannot, therefore, be an offense against the laws of the State, no matter what the statute of the State may be—the laws of the United States being the supreme law of the land.

12. It is the exclusive province of the United States Courts to ultimately, and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore, the prerogative of the National Courts to construe the National Statutes and determine upon *habeas corpus* whether a homicide for which the petitioner is charged with murder by the State authorities was the result of an "act done in pursuance of a law of the United States," and when that question has been determined in the affirmative, the prisoner will be discharged, and the State has nothing more to do with the matter.

13. All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the

various departments of the Government, without which the Government could not perform functions necessary to its existence. The exercise of such powers, is, nevertheless, in pursuance of the laws of the United States.

14. When statutes confer powers, impose duties, and provide for the accomplishment of various objects they are, necessarily, couched in general terms, but they carry with them by implication, all the powers, duties and exemptions, necessary to accomplish the objects thereby sought to be attained.

15. The acts of the heads of departments of the United States Government in the line of their duties, are in contemplation of law, the acts of the President himself.

16. A party resisting a murderous assault, where several lives are in danger, being in the best position to judge as to the dangers and requirements of the occasion, is the one to determine when the proper moment has arrived, in self-defense, to slay his assailant, in order to be justified by the law; and if he acts in good faith, with reasonable judgment and discretion, the law will justify him, even though he errs. Where several lives are in danger from the assault of a powerful, infuriated, desperate man, common prudence would dictate that the party assailed should fire a second or two, too soon, rather than the fraction of a second too late.

Before SAWYER, Circuit Judge, and SABIN, Dist. Judge.

STATEMENT OF FACTS.

This is an application for the discharge of David Neagle upon a writ of habeas corpus. It arises out of the following facts:

On the 3d of September, 1888, certain cases were pending in the Circuit Court of the United States for the Northern District of California, between Frederick W. Sharon, as executor, *vs.* David S. Terry and Sarah Althea Terry, his wife, and between Francis G. Newlands, as trustee, and others against the same parties, on demurrers to bills to revive and carry into execution the final decree of the court in the suit of *William Sharon* vs. *Sarah Althea Hill*, and were decided on that day. That suit was brought to have an alleged

marriage contract between the parties adjudged to be a forgery, and obtain its surrender and cancellation. The decree rendered adjudged the alleged marriage contract to be a forgery, and ordered it to be surrendered and canceled. The decree was rendered after the death of William Sharon, and was therefore entered as of the day when the case was submitted to the court. By reason of the death of Sharon it was necessary, in order to execute the decree, that the suit should be revived. Two bills were filed, one by the executor of the estate of Sharon, and the other a bill of revivor and supplemental by Newlands as trustee for that purpose.

In deciding the cases, the Court gave an elaborate opinion upon the questions involved, and whilst it was being read, certain disorderly proceedings took place for which the defendants, David S. Terry and his wife, were adjudged guilty of contempt and ordered to be imprisoned. The following is an accurate statement of those proceedings, slightly condensed from the opinion of the Court delivered on the subsequent application of David S. Terry to have the order of commitment revoked. For the whole proceeding, see *In re* Terry, 36 Fed. Rep., 419.

Shortly before the court opened, the defendants came into the courtroom, and took their seats within the bar at the table next to the clerk's desk, and almost immediately in front of the Judges, the defendant, David S. Terry, being at the time armed with a bowie-knife concealed on his person, and the defendant, Sarah Althea, his wife, carrying in her hand a small satchel which contained a revolver of six chambers, five of which were loaded. The court at the time was held by the Justice of the Supreme Court of the United States allotted to this circuit, who was presiding, the United States Circuit Judge of this circuit, and the United

States District Judge of the District of Nevada, called to this district to assist in holding the Circuit Court. Almost immediately after the opening of the court, the Presiding Justice commenced reading its opinion in the cases mentioned, but had not read more than one-fourth of it when the defendant, Sarah Althea Terry, arose from her seat and asked him, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled.

The Presiding Justice replied, "Be seated, madam." She repeated the question, and was again told to be seated. She then cried out, in a violent manner, that the Justice had been bought, and wanted to know the price he held himself at; that he had got Newland's money for his decision, and everybody knew it, or words to that effect. It is impossible to give her exact language. The Judges and parties present differed as to the precise words used, but all concurred as to their being of an exceedingly vituperative and insulting character.

The Presiding Justice then directed the Marshal to remove her from the court-room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect. The Marshal thereupon proceeded towards her to carry out the order for her removal and compel her to leave, when the defendant David S. Terry rose from his seat, evidently under great excitement, exclaiming, among other things, that "No living man shall touch my wife," or words of that import, and dealt the Marshal a violent blow in his face. He then unbuttoned his coat and thrust his hand under his vest, where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The Marshal then removed

Mrs. Terry from the court-room. Soon afterward Mr. Terry was allowed to rise, and was accompanied by officers to the door leading to the corridor on which was the Marshal's office. As he was about leaving the room, or immediately after stepping out of it, he succeeded in drawing his knife, when his arms were seized by a Deputy Marshal and others present, to prevent him from using it, and they were able to take it from him only after a violent struggle.

The petitioner Neagle wrenched the knife from his hand, whilst four other persons held on to the arms and body of Terry, one of whom presented a pistol to his head, threatening at the same time to shoot him if he did not give up the knife. To these threats Terry paid no attention, but held on to the knife, actually passing it during the struggle from one hand to another.

Mr. Cross, a prominent attorney, who on that occasion sat next to Mrs. Terry, a little to her left and rear, testifies that just before she arose to interrupt Justice Field, she nervously worked at the clasp of a small satchel about nine inches long, and tried to open it; and not succeeding, in consequence of her excitement, she hastily sprang to her feet and interrupted the Justice as hereinbefore stated. Knowing that she had before drawn a pistol from a similar satchel in the Master's room, he concluded at this time that she was trying to get her pistol out, and he consequently held himself in readiness to seize her arm as soon as it should appear, and endeavor to prevent its use until he could get assistance, his right arm being partially disabled. For one occasion in the Master's office see (*Sharon* vs. *Hill*, 11 Sawyer, 123.) At this time Mrs. Terry sat directly in front of Justice Field and the Circuit Judge, less than four yards from either. A loaded revolver was afterwards taken from this satchel

by the Marshal. For their conduct and resistance to the execution of the order of the Court, the defendants, Sarah Althea Terry and David S. Terry, were adjudged guilty of contempt and ordered to be imprisoned, the former for thirty days and the latter for six months.

In consequence of the imprisonment which followed, various threats of personal violence to Justice Field and the Circuit Judge were made by Terry and his wife. Those threats were that they would take the lives of both of those Judges; those against Justice Field were sometimes that they would take his life directly, at other times that they would subject him to great personal indignities and humiliations, and if he resented it they would kill him.

These threats were not made in ambiguous terms, but openly and repeatedly, not to one person, but to many persons, until they became the subject of conversation throughout the State and of notice in the public journals. Reports of these threats through the press and through reports of the United States Marshal and United States Attorney reached Washington, and in consequence of them the Attorney-General thought proper to give instructions to the Marshal of the United States for the Northern District of California to take proper measures to protect the persons of those judges from violence at the hands of Terry and his wife. On the return of Justice Field from Washington to attend his circuit in June last, the probability of an attack by Judge Terry upon him was the subject of conversation throughout the State and of notices in some of the journals in the city of San Francisco. It was the general expectation that if Judge Terry met Justice Field violence would be attempted upon the latter.

In consequence of this general belief and expectation, and the fact that the Attorney-General of the

United States had given instructions to the Marshal to see that the persons of Justice Field and of the Circuit Judge should be protected from violence, the Marshal of the Northern district appointed the petitioner in this case, David Neagle, to accompany Mr. Justice Field whilst engaged in the performance of his duties and whilst passing from one district to another within his circuit, so as to guard him against the threatened attacks. He was specially commissioned as a deputy by Mr. Franks, whose instructions to him were that he should protect Justice Field at all hazards, and knowing the violent and desperate character of Terry, that he should be active and alert, and be fully prepared for any emergency, but not to be rash; and in case any violence was attempted from anyone, to call upon the assailant to stop, and to inform him that he was an officer of the United States.

Judge Terry was a man of great size and strength, who had the reputation of being always armed with a bowie-knife, in the use of which he was specially skilled, and of showing great readiness to draw and use it upon persons towards whom he entertained any enmity or had any grievance, real or fancied.

On the 8th of August, 1889, Justice Field left San Francisco for Los Angeles in order to hear a *habeas corpus* case which was returnable before him at that city on the 10th of August, and also to be present at the opening of the court on the 12th. He was accompanied by Deputy Marshal Neagle, the petitioner. Justice Field heard the *habeas corpus* case on the 10th of August. On the 12th of August he opened the Circuit Court, Judge Ross sitting with him, and he delivered on the latter day an opinion in an important land case, and also an opinion in the *habeas corpus* case. On the following day the Court heard an application for

an injunction in an important water case from San Diego County. No other cases being ready for hearing before the Circuit Court, he took the train on Tuesday, the 13th, at 1:30 o'clock in the afternoon, for San Francisco, where he was expected to hear a case then awaiting his arrival immediately upon his return, being accompanied on his return by Deputy Marshal Neagle. On the morning of the 14th, between the hours of seven and eight, the train arrived at Lathrop, in San Joaquin County, which is in the Northern District of California, a station at which the train stopped for breakfast. Justice Field and the Deputy Marshal at once entered the dining-room there to take their breakfast, and took their seats at the third table in the middle row of tables. Justice Field seated himself at the extreme end, on the side looking toward the door. The Deputy Marshal took the next seat on the left of the Justice. What subsequently occurred is thus stated in the testimony of Justice Field:

"A few minutes afterward Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was, 'There is Judge Terry and his wife.' He remarked, 'I see him.' Not another word was said. I commenced eating my breakfast. I saw Judge Terry take his seat. In a moment or two afterwards I looked round and saw Judge Terry rise from his seat. I supposed at the time he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came round back of me—I did not see him—and he

struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard 'Stop, stop,' cried by Neagle. Of course I was for a moment dazed by the blows. I turned my head round and I saw that great form of Terry's, with his arm raised and his fists clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, "'Stop, stop, I am an officer.' Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around and saw Terry on the floor. I looked at him and saw that peculiar movement of the eyes that indicates the presence of death. Of course it was a great shock to me. It is impossible for anyone to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected, and I was. I looked at him for a moment, then rose from my seat, went around and looked at him again, and passed on. Great excitement followed. A gentleman came to me whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said: 'What is this?' I said: 'I am a Justice of the Supreme Court of the United States. My name is Judge Field. Judge Terry threatened my life, and attacked me, and the Deputy Marshal has shot him.' The Deputy Marshal was perfectly cool and collected, and stated: "I am a Deputy Marshal and I have shot him to protect the life of Judge Field.' I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterwards the Deputy Marshal said to me: 'Judge, I

think you had better go to the car.' I said, 'Very well.' Then this gentleman, Mr. Lidgerwood, said: 'I think you had better.' And with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The Marshal went with me, remained for some time and then left his seat in the car, and as I thought went back to the dining-room. (This is, however, I am told, a mistake, and that he only went to the end of the car). He returned, and either he or someone else stated that there was great excitement, that Mrs. Terry was calling for some violent proceedings. I must say here that, dreadful as it is to take life, it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that had the Marshal delayed two seconds both he and myself would have been the victims of Terry."

In answer to a question whether he had a pistol or other weapon on the occasion of the homicide, Justice Field replied: "No, Sir. I have never had on my person, or used a weapon since I went on the bench of the Supreme Court of the State, on October 13, 1857, except once." That was on an occasion when he crossed the Sierra Nevada Mountains, in 1862. "With that exception, I have not had on my person, or used a pistol or other deadly weapon."

Mr. Neagle in his testimony stated that before the train arrived at Fresno, he got up and went out on the platform, leaving the train, and there saw Judge Terry and his wife get on the cars; that when the train arrived at Merced he spoke to the conductor, Woodward, and informed him that he was a Deputy United States Marshal; that Judge Field was on the train, and also Judge Terry and his wife, and that he was apprehensive that when the train arrived at Lathrop there would be trouble between those parties, and inquired whether there was any officer at that

station, and was informed in reply that there was a constable there; that he then requested the conductor to send word to the officer to be at Lathrop on the arrival of the train, and that he also applied to other parties to induce them to endeavor to secure assistance for him at that place in case it should be needed. The Deputy Marshal further stated that when the train arrived at Lathrop Justice Field went into the dining-room, he accompanying the Justice; that they took seats at a table, that shortly after they were seated, Judge Terry and his wife entered the dining-room, his wife following him several feet in the rear; that when the wife reached a point nearly opposite Justice Field, she turned around and went out rapidly from the room, and, as appeared from what afterward followed, she went to the car to get her satchel. When she returned from the car, the satchel was taken from her, and it was found to contain a pistol—revolver—containing six chambers, all of which were loaded with ball. This pistol lay on the top of the other articles in the satchel. The witness further stated that Judge Terry passed down opposite Justice Field, to a table below where they were sitting; that in a few minutes, whilst Justice Field was eating, Judge Terry rose from his seat, went around behind him—the Justice not seeing him at the time—and struck him two blows, one on the side and the other on the back of the head; that the second blow followed the other immediately; that one was given with the right hand and the other with the left; that Judge Terry then drew back his hand, with his fist clenched, apparently to give the Justice a violent blow on the side of his head, when he, Neagle, sprang to his feet, calling out to Terry, "Stop! Stop! I am an officer;" that Terry bore at the time on his face an expression of intense hate and passion, the most malignant the

witness had ever seen in his life, and that he had seen a great many men in his time in such situations, and that the expression meant life or death for one or the other; that as he cried out those words, "Stop! Stop! I am an officer," he jumped between Terry and Justice Field, and at that moment Judge Terry appeared to recognize him, and instantly, with a growl, moved his right hand to his left breast, to the position where he usually carried his bowie-knife; that, as his hand got there, the Deputy Marshal raised his pistol and shot twice in rapid succession, killing him almost instantly. He further stated that the position of Judge Field was such—his legs being at the time under the table, and he sitting—that it would have been impossible for him to have done anything even if he had been armed, and that Judge Terry had a very furious expression, which was characterized by the witness as that of an infuriated giant. He also added, that his cry to him to stop was so loud that it could be heard throughout the whole room, and that he believed that a delay in shooting of two seconds would have been fatal both to himself and Justice Field.

The facts thus stated in the testimony of Justice Field and the petitioner, were corroborated by the testimony of all the witnesses to the transaction. The petitioner soon afterwards accompanied Justice Field to the car, and whilst in the car he was arrested by a constable, and at the station below Lathrop was taken by that officer from the car to Stockton, the county seat of San Joaquin County, where he was lodged in the county jail. Mr. Justice Field was obliged to continue on to San Francisco without the protection of any officer. On the evening of that day Mrs. Terry, who did not see the transaction, but was at the time outside of the dining-room, made an affidavit that the killing of Judge Terry was murder, and charged Justice

Field and Deputy Marshal Neagle with the commission of the crime. Upon this affidavit, a warrant was issued by a Justice of the Peace at Stockton against Neagle and also against Justice Field. Subsequently, after the arrest of Justice Field, and after his being released by the United States Circuit Court on *habeas corpus* upon his own recognizance, the proceeding against him before the Justice of the Peace was dismissed, the Governor of the State having written a letter to the Attorney-General of the State, declaring that the proceeding, if persisted in, would be a burning disgrace to the State, and the Attorney-General having advised the District Attorney of San Joaquin County to dismiss it. There was no other testimony whatever before the Justice of the Peace except the affidavit of Sarah Althea Terry upon which the warrant was issued.

In the suit of William Sharon against Mrs. Terry in the Circuit Court of the United States, it was adjudged that the alleged marriage contract between her and Sharon, produced by her, was a forgery, and it was held that she had attempted to support it by perjury and subornation of perjury. She had also made threats during the past year, and up to the time of the shooting of Judge Terry, that she would kill the Circuit Judge and Justice Field, and she repeated that threat up to the time she made her affidavit for the arrest of Justice Field and Neagle; and that she had made such threats was a notorious fact in Stockton and throughout the State.

The petition was accordingly presented, on behalf of Neagle, to the Circuit Court of the United States for a writ of *habeas corpus* in this case, alleging, among other things, that he was arrested and confined in prison for an act done by him in the performance of his duty, namely, the protection of Mr. Justice Field, and taken

away from the further protection which he was ordered to give to him. The writ was issued, and upon its return, the Sheriff of San Joaquin County produced a copy of the warrant issued by the Justice of the Peace of that county, and of the affidavit of Sarah Althea Terry upon which it was issued. A traverse to that return was then filed in this case, presenting various grounds why the petitioner should not be held, the most important of which were, that an officer of the United States, specially charged with a particular duty, that of protecting one of the Justices of the Supreme Court of the United States whilst engaged in the performance of his duty, could not, for an act constituting the very performance of that duty, be taken from the further discharge of his duty and imprisoned by the State authorities, and that when an officer of the United States in the discharge of his duties is charged with an offense consisting in the performance of those duties, and is sought to be arrested, and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer, and the fact then inquired into. The Attorney-General of the State appeared with the District Attorney of San Joaquin County, and contended that the offense of which the petitioner is charged could only be inquired into before the tribunals of the State.

The question of the jurisdiction of the national tribunal to interfere in the matter was elaborately argued by counsel, the Attorney-General of the State and Mr. Langhorne appearing with the District Attorney of San Joaquin county on behalf of the State, and Mr. Carey, United States Attorney, and Messrs. Herrin, Mesick and Wilson appearing on behalf of the petitioner. The latter did not pretend that any person in this State, high or low, who committed a crime, might not be tried by the local authorities if it were a crime

against the State, but that when in the performance of his duties that alleged crime consisted in an act which is deemed a part of the performance of a duty devolved upon him by the laws of the United States, it was within the competency of the national tribunals to determine in the first instance whether that act was a duty devolving upon him, and if it was a duty devolving upon him the officer had committed no offense against the State and was entitled to be discharged.

JOHN T. CAREY, United States Attorney; RICHARD S. MESICK, SAMUEL M. WILSON, WM. F. HERRIN, W. L. DUDLEY, C. L. ACKERMAN, J. C. CAMPBELL, H. C. MCPIKE, for the Petitioner.

G. A. JOHNSON, Attorney-General, State of California; J. P. LANGHORNE; AVERY C. WHITE, District Attorney, San Joaquin County, Cal., for the Respondent.

OPINION OF THE COURT.

By the Court, Sawyer, Circuit Judge: The petitioner has sued out a writ of habeas corpus, returnable before the Court, alleging that he is unlawfully deprived of his liberty and imprisoned by virtue of a warrant issued by a Justice of the Peace of San Joaquin county, in this State, charging him with a felonious homicide, whilst the act thus characterized was a lawful act performed in the discharge of his duties as an officer of the United States; and the first question presented is whether this Court has jurisdiction to inquire into the truth of that allegation.

Upon the question of jurisdiction, Section 751, R. S., provides that "the Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus;" and Section 752 further provides that

"the several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." There is no limit in these provisions to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person. But Section 753 prescribes some limitations, among which is "that the writ shall not extend to a prisoner in jail, * * * unless he is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a Court thereof, or in custody in violation of the Constitution, or of a law or treaty of the United States," and this legislation, in the language of the Chief Justice, in McCardle's case, (6 Wall., 325-6), in commenting upon the same provision in a prior act, "is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every Court, and of every Judge, every possible case of privation of liberty, contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction." And again, in *Ex Parte* Royall, 117 U. S., 249, the Supreme Court says, "As the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of habeas corpus cannot be suspended unless when in cases of rebellion or invasion, the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union, and of their justices and judges. That the petitioner is held under the authority of a State cannot effect the question of the power or jurisdiction

of the Circuit Court, to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution. The Grand Jurors who found the indictment, the Court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all equally with citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, 'anything in the Constitution and laws of any State to the contrary notwithstanding, 'and that equal power does not belong to the courts and judges of the several States; that they cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws, results from the supremacy of the Constitution and laws of the United States." *Ableman* vs. *Booth*, 21 How., 506; Tarble's Case, 13 Wall., 397; *Robb* vs. *Connolly*, 111 U. S., 624.

"We are, therefore, of opinion that the Circuit Court has jurisdiction upon writ of habeas corpus to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution."

In the exercise of this jurisdiction there is no conflict between the authority of the State and of the United States. The State in such cases is subordinate, and the National Government paramount. "The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." Siebold's case, (100 U. S., 392); see also *Tennessee* vs. *Davis*, (100 U. S., 257–8). The exclusive authority of the State to determine

whether an offense has been committed against the laws of the State is now earnestly pressed upon our attention. In Siebold's case the Court says: "It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised toward this government in reference to the preservation of our liberties than is proper to be exercised toward the State governments. Its powers are limited in number and clearly defined, and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the National and State Governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other." 100 U. S., 394; see Id., 266–7.

This Court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or committed in pursuance of a law of the United States," then he is in custody in violation of the Constiution and laws of the United States, and he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued—the Constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the State of California, and only the State can deal with it as such or in that aspect. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle was an "act done * * * in pursuance of a law of the United States," within the powers of the National Government, then it *is not*, and *it cannot* be, an offense against the laws of the State of California, no matter what the statute of the State may be, the laws of the United States being the supreme law of the land. A State law which contravenes a valid law of the United States, is in the nature of things, necessarily void—a nullity. It must give place to the "supreme law of the land." In legal contemplation there can no more be two valid laws which are in conflict, operating upon the same subject matter at the same time, than in physics two bodies can occupy the same space at the same time.

But, as we have seen by the authorities cited, it is the exclusive province of the Judiciary of the United States to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the National Courts to

conclusively construe the National Statutes and determine whether the homicide in question was the result of an "act done in pursuance of a law of the United States," and when that question has been determined in the affirmative, the petitioner must be discharged, and the State has nothing more to do with the matter. All we claim is the right to determine the question, was the homicide the result of "an act done in pursuance of a law of the United States?" and if so, discharge the petitioner.

As incidental to and involved in that question, it is necessary to inquire whether the act of the petitioner was performed under such circumstances as to justify it. If it was, then he was in the line of his duty. If not, then it was outside his duty. We do not make the inquiry at all for the purpose of determining whether the act was an offense, or justifiable under the Statutes of the State. We do not assume to consider the case in that aspect at all. We simply determine whether it was an act performed in pursuance of a law of the United States. Nor do we act in this matter because we have the slightest doubt as to the impartiality of the State courts, and their ability and disposition to, ultimately, do exact justice to the petitioner. We have not the slightest doubt or apprehension in that particular; but there is a principle involved. The question is, has the petitioner *a right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority and duty, a further right to be protected by that sovereignty whose servant he is and whose laws he was executing? If he has that right, then there is no encroachment upon the State jurisdiction, and this Court must necessarily entertain his petition and determine his rights under it, and under the laws of the United States. It has no discretion. It cannot decline to hear him without

an utter disregard of one of the most important duties imposed upon it by the Constitution and laws of the United States. What the State tribunals might, or might not do, in this particular instance is not a matter for a moment's consideration. The question is, what are the rights of the petitioner as to having his case heard and disposed of in the courts of the sovereignty whose servant he is and whose laws he was employed in executing. If he has a right to be heard in this Court, then we must hear him, willing or unwilling. There is no alternative. Whether the writ should issue, in this case, was not a question of "expediency," and whether the petitioner shall be discharged or remanded is not a question of "policy" or "comity," as suggested in some quarters. It is a question of personal right and personal liberty arising under the constitution and laws of the United States, which the Court cannot ignore. There is a class of cases, of which *ex parte Royall* is an example, in which the Court may exercise a discretion as to the *time* of interference, but, in our opinion, this is not one of them. *Ex parte Royall*, 117 U. S., 251. But if it rests in our discretion to discharge or remand the petitioner to the State Courts, to be there first tried for an offense against the State, while we are satisfied that he is entitled to be discharged, to what useful end would he be sent back, since upon being tried and convicted he would still be discharged by the national courts on *habeas corpus*, if the act should appear to them to have been performed in pursuance of a law of the United States? This would be but to put the State to great useless expense, and subject the petitioner, if guilty of no offense, to unjust imprisonment in violation of his legal rights, until his trial could be had, and his writ of *habeas corpus* afterwards again sued out, heard and decided, when the result, in all probability, would

at last be the same. Evidently, public justice demands that the case should be "summarily" decided now, as required by Section 761, R. S. The Court has no right to trifle with the petitioner's constitutional rights by unnecessarily subjecting him to unjust imprisonment, great expense and vexatious delays. In case of a remand and conviction, the national courts must hear and decide the case at last. Far better for all concerned that they should decide it now, and forever end it. We have no desire to usurp a jurisdiction that does not belong to us. We have enough to do in exercising the admitted jurisdiction conferred upon us, without seeking to enlarge it in the smallest particular, but we must perform our duty as we understand it, be the consequences what they may.

The Statutes of the United States also make ample provision for giving full effect to the jurisdiction of this Court in cases where the petitioner alleges that he is restrained of his liberty in violation of the Constitution or of a law of the United States, in Section 766, which reads as follows, to wit:

"Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void."

It is, therefore, only necessary, in order to dispose of the case, to inquire and ascertain whether the petitioner is in custody for an act done in pursuance of a law of the United States.

As we have seen from the statement of facts, Mr. Justice Field, of the United States Supreme Court, allotted to the Ninth Circuit, was traveling, officially, from one part of his circuit to another, in pursuance of the requirements of the statutes of the United States, for the purpose of holding a Circuit Court. By reason of threats against his life made by dissatisfied litigants, generally known and published in the newspapers and brought to the knowledge of the United States Marshal for the Northern District of California, and by him called to the attention of the Attorney-General of the United States, that officer directed the Marshal to furnish the Justice with protection while thus engaged in the performance of his judicial duties on the circuit. The Marshal, deeming it proper, furnished the necessary protection by assigning that duty to the petitioner, who was a United States Deputy Marshal. The claim is that the petitioner, as such Deputy Marshal, was affording the only protection practicable to Justice Field, in the lawful discharge of his duty, when the homicide was committed, and that the killing was necessary for the preservation of the lives of both Justice Field and himself at the time the fatal shot was fired. The homicide was committed at Lathrop, and not upon land purchased by the United States with the consent of the State for the needful uses of the United States, in pursuance of Article 1, Section 8, of the Constitution.

Conceding the points to be as stated, do they present a case of an act performed in pursuance of a law of the United States, subject to their jurisdiction and to the jurisdiction of this Court, and is the petitioner held under an arrest on a charge of murder by the State, "in custody in violation of the Constitution or laws of the United States," within the meaning of the statute?

It is urged that since the homicide was committed in the State at large, and not in the Courthouse or upon land within the exclusive jurisdiction of the United States, the question as to whether the homicide is murder is a question arising exclusively under the laws of the State, and that it can be investigated and determined by the State courts alone. It is admitted on the part of the State that the United States has exclusive jurisdiction over the Custom House block and "over all places purchased by the consent of the Legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," in pursuance of Section 8, Article I. of the National Constitution, and that the State has no jurisdiction whatever of any offense committed in such places. But it is contended that the United States has no jurisdiction of offenders outside the lands so purchased, in other portions of the State, but that in the State at large the jurisdiction of the State is exclusive. This proposition, like most others urged by those who insist on extreme State rights doctrines, wholly ignores the principle that there can be no legal conflict or inconsistency in matters wherein the State is subordinate, and the United States paramount—where the Constitution and laws of the United States are the supreme law of the land. We have already seen that although in certain cases the courts of the United States have jurisdiction to discharge on habeas corpus, prisoners held in custody by the State courts in violation of the Constitution and laws of the United States, yet that the State courts "cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of Commissioners of such courts, or by officers of the general government acting under

such laws," and that this "results from the supremacy of the Constitution and laws of the United States." This principle, established in the Booth and Tarble cases, was recently properly recognized by the Supreme Court of California, when upon the return of the writ of habeas corpus in Terry's case, it appearing, that he was in custody by virtue of a judgment of the United States Circuit Court, it declined to require the Sheriff to produce his body. As the powers and duties of the State and National courts are by no means reciprocal, in this class of cases, so they are not reciprocal in the matter of territorial jurisdiction mentioned, as claimed on the part of the State. The Constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts to enforce rights derived thereunder, is as extensive as the territory to which they are applicable.

In Siebold's case, the Supreme Court, in reply to an argument in favor of a wide extension of State rights, uses the following language peculiarly applicable to the point now under consideration: "Somewhat akin to the argument which has been considered is the objection, that the Deputy Marshals authorized by the Act of Congress to be created and to attend the elections are *authorized to keep the peace;* and that this is a duty which belongs to the State authorities alone. It is argued *that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States.* Here, again, we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it

to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, shall * * * be the supreme law of the land.'" (100 U. S., 394–5). And again, "The argument is based on a strained and impracticable view of the nature and powers of the National Government. *It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have the power to command obedience, to preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.*" (Id. 396). The power to keep the peace is a police power, and the United States has the power to keep the peace in matters affecting their sovereignty.

There can be no doubt, then, that the jurisdiction of the United States is not affected by reason of the place —the locality—where the homicide occurred. If the locality is a necessary element of jurisdiction, a majority of the offenses created by the statutes would be out of their jurisdiction, and the statutes creating such offenses would be nullities, and practically useless.

For example, for a quarter of a century the United States Courts in this State were held in rented buildings, owned by private parties. They had no jurisdiction over them under the provision of Section 8, Article I, of the National Constitution; and no jurisdiction other than that had over other portions of the country to which the Constitution and its laws extended. Had an assault been committed in open Court upon the Judge, in one of these buildings, and the assailing party been slain by the Marshal in protecting the Judge, under circumstances excusing or justifying the homicide, would it be pretended that the Court would have no jurisdiction to protect him from interference by the State Government? Or have the United States and their courts no jurisdiction over the offense of resisting a United States Marshal in the lawful execution of the process of the courts? or over the crime of counterfeiting the coin or forging the bonds or other securities of the United States, or other offenses against the laws, unless the offense is committed in a place under the exclusive jurisdiction of the United States? Such a claim would be preposterous.

In the case of *Tennessee* vs. *Davis*, the defendant was indicted for murder in killing one Haynes, while he was engaged in discharging his duties as a Deputy Collector of Internal Revenue of the United States, and which killing Davis claimed was in self-defense. The case was removed to the Circuit Court of the United States under Section 643, R. S. It was contended that this act was an encroachment upon State rights, since it took away the right of the State to determine and execute its own criminal laws; and was, therefore, unconstitutional. The Supreme Court sustained the act. It was held "that the United States is a government with authority extending over all the territory of

the Union, acting upon the State and the people of the State." In deciding the case the Court said: "As was said in *Martin* vs. *Hunter*, (1 Wheat. 363), the 'general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the laws of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection; if their protection must be left to the action of the State court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, a case can be brought into the United States court for review, *the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.*"

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its *sovereignty* extends it is supreme. No State government

can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." *Tennessee* vs. *Davis*, 100 U. S., 262–3.

These expositions of the territorial extent of the jurisdiction of the General Government are authoritative and conclusive, and the result is that wherever the Constitution and laws of the United States operate at all, the State laws in conflict with them are subordinate, and those of the United States are supreme and paramount.

Numerous cases are reported in the books, wherein parties arrested for offenses under the State laws, for acts performed in the discharge of duties imposed by the laws of the United States, have been discharged from imprisonment on *habeas corpus* by the United States courts, in consonance with these principles, now authoratively established by the Supreme Court of the United States, in the cases cited, and others in the same line.

Thus, in *ex parte Jenkins*, and others, Deputy United States Marshals, who were arrested on the warrant of a justice of the peace in Pennsylvania, for shooting and wounding a negro. who resisted an arrest attempted under a warrant issued by the United States Court for a fugitive slave, Mr. Justice Grier of the United States Circuit Court, took jurisdiction and discharged the petitioners, under the Act of 1835, since carried into the Revised Statues, as part of section 753, under which this case arises. After their discharge, they were arrested again, in a suit by the negro for tresspass, upon a warrant issued by a judge of the Supreme Court of Pennsylvania, and again discharged on habeas corpus by the United States Cir-

cuit Court. After this they were indicted for the shooting and wounding of the negro by the grand jury of Luzerne County, and a third time released on habeas corpus. *Ex parte* Jenkins, 2 Wall., Jr. p. 521, *et seq.* In the first of these cases Mr. Justice Grier observes, "What then. have we power to do on the return of the writ?"

"The writ of habeas corpus is a high prerogative writ known to the common law: the great object of which is the liberation of those who may be in prison without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. It brings the body of the prisoner up, together with the cause of his commitment. The Court can, undoubtedly, inquire into the sufficiency of that cause." * * * "Warrants of arrest issued on the application of private informers, may show on their face a *prima facie* charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present—A tells B that he has seen C kill D. B runs off to a justice, swears to the murder boldly, without any knowledge of the facts, and takes out a warrant for C, who is arrested and imprisoned in consequence thereof. C prays a habeas corpus, and shows that he was the sheriff of the county, and hanged D in pursuance of a legal warrant. If a court could not discharge a prisoner in such a case because the warrant was regular on its face the writ of habeas corpus is of little use."

"The authority conferred on the judges of the United States by this Act of Congress gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned 'by any authority,' for an act

done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may *acknowledge their utter impotence to protect him?*" * * *

In *ex parte Robinson* Mr. Justice McLean held that "a writ of habeas corpus may issue to relieve an officer of the Federal Government who has been imprisoned under State Authority for the performance of his duty." (6 McLean, 355.) In the course of the decision the learned Justice observes: "It is a general principle of law, to which I know of no exception, that the laws of every government shall be construed by itself; and such construction is acted upon by 'the judiciary of all other countries. By the Federal Constitution the judicial power of the United States is declared to be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time order and establish.' Under this provision the judiciary of the Union gives a construction to the laws which is obligatory on the State tribunals. The Constitution again declares, 'the Constitution and laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.'" (Id. 362.) Thus, it is the exclusive prerogative of the National Courts to finally determine whether an act performed by one of the officers of the United States, and especially an officer of the Court itself, is done in pursuance of a law of the United States, or whether, when under arrest for acts per-

formed in connection with his office, he is "in custody in violation of the Constitution or of a law of the United States."

In the case of *Roberts* vs. *Jailer* of Fayette County, Kentucky, 2 Abb., 365, a special Deputy United States Marshal was arrested, under the State laws, on a charge of murder, for a homicide committed by him in attempting to arrest one Cull upon a warrant issued by a Commissioner of the United States Circuit Court, for offenses charged to have been committed under the internal revenue laws. Upon the hearing, the United States Circuit Court found that the homicide was committed in the performance of "an act done in pursuance of a law of the United States, or of a process of a court or judge of the same," and discharged the petitioner. The question of the jurisdiction of the Court, and the facts, were elaborately discussed.

So, *In re Ramsey*, 2 Flippin, 451, the prisoner was a Deputy United States Marshal, in custody by order of a State Court, on a charge of murder, the homicide having been committed in an attempt to arrest, upon a warrant issued by the United States courts, the party slain. The Court found that the act was done in pursuance of a law of the United States; that petitioner was justified in the act which he performed, and discharged him. See, also, to the same effect, *In re* Neill, 8 Blatch, 167. *In re* Farrand, 1 Abb., 140; Electoral College of South Carolina, 1 Hughes, 571: *In re* Hurst, 2 Flip. 510, and cases collected in vol. 29 Myers, Fed. Decisions, 698. Thus it appears to be settled, beyond controversy, that, where a party is in custody by State authority, for an act done, or omitted to be done, in pursuance of any specific provision of a statute of the United States, imposing a duty upon him, or for an act performed justifiable by the circumstances of the case, in order to enable him

to perform that duty, or in the execution of any order, or process, or decree, of a Court of the United States, or of a judge thereof, the courts of the United States have jurisdiction to discharge him on habeas corpus, under Section 753 of the Revised Statutes. In such a case, the laws of the United States are supreme, and the act cannot be an offense against the laws of the State, and as we have before seen, whether an act is performed in pursuance of a law of the United States, is a question exclusively for the United States Courts to authoritatively and conclusively determine. They must interpret finally the laws of the United States. With their decision the State cannot interfere. When the United States Courts have spoken on the subject, the State has nothing more to do with it.

The only remaining questions to determine are:

1. Was the homicide now in question, committed by petitioner, while acting in discharge of a duty imposed upon him by the Constitution or laws of the United States, within the meaning of Section 753 of the Revised Statutes?

2. Was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time, and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

It is urged that there is no statute, which, specifically, makes it the duty of a Marshal, or a Deputy Marshal, to protect the Judges of the United States Courts while out of the court-room, traveling from one point to another in the Circuit, on official business, from the violence of litigants, who have become offended at adverse decisions made by such judges in the performance of their judicial duties, and that

Marshals, or deputies, so engaged, are not within the provisions of Section 753 of the Revised Statutes.

It will be observed that the language of the provision of Section 753 is "an act done * * * in pursuance of *a law* of the United States," not in pursuance of a *statute* of the United States.

The statutes of Congress, in their express provisions, do not present all the law of the United States. Their incidents and implications are as much a part of the law as their express provisions. When they prescribe duties, provide for the accomplishment of certain designated objects, or confer authority in general terms, they carry with them all the powers essential to effect the ends designed.

Says the Supreme Court in *Tennessee* vs. *Davis*, 100 U. S., 264, quoting with approbation from Chief Justice Marshall:

"'It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from State control." * * * "The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. *It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is*

not expressed in any Act of Congress. It is incidental to, and is implied, in the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone—that is, the judicial power is the instrument employed by the government in administering this security.' "

If the officers referred to in the preceding passage are to be protected while in the line of their duty, without any special law or statute requiring such protection, are not the judges of the courts—the principal officers in a department of the government second to no other—also to be protected, and are not their executive subordinates—the marshals and their deputies—to be shielded from harm by the national laws, while honestly engaged in protecting the heads of the courts from assassination? When it was argued in Siebold's case that it was not in the power of the United States to authorize the United States Marshals to "*keep the peace*" *at Congressional elections,* "*that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belonged exclusively to the State,*" we have seen the answer of the Supreme Court to that argument, in cases where the rights and interests of the *United States Government were involved in the matter of keeping the peace.* "We hold it to be an incontrovertible principle," said the Court, "that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, *and hence the power to keep the peace to that extent.* And again, "Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can

they perform, if they cannot use force? In executing the processes of the courts, must they call upon the nearest constable for protection? Must they rely upon him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation." 100 U. S., 395-6.

In this particular case the petitioner, long before he reached Lathrop, endeavored through the conductor and the proprietor of the eating-house at that place, to have "*a constable*" in readiness, on the arrival of the train, *to keep the peace*, but without success. When too late to prevent the tragedy the constable appeared and arrested the petitioner, for performing the duty which it is now claimed devolved exclusively upon himself, or some other peace officer of the State.

Had the United States in this instance relied upon another government—the State of California—to keep the peace as to one of their most venerable and distinguished officers—one of the Judges of their highest court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed, and there would now in all probability be a vacancy on the bench of one of the most august judicial tribunals in the world, and the deceased—the would-be assassin—might, perhaps, be a tenant of the Stockton jail, to be disposed of by another govern-

ment. The case affords a striking illustration of the necessity for the United States to protect their own officers while in the discharge of their duties, and by such protection protect the nation itself.

The result was, that instead of arresting the conspirator in the contemplated murder—the wife of the deceased, armed with a loaded revolver till relieved of it by a citizen—threatening death to Justice Field, calling upon the bystanders to aid her, and attempting to enter the car, with the avowed purpose of compassing his death, the officer of the United States assigned by his government to the special duty of protecting the justice's life against these very parties, while in the actual performance of the duties so assigned him, was, himself, arrested, without warrant, and disarmed by an inferior officer of the State, and interrupted in the discharge of those momentous duties, thereby leaving his charge helpless, and without the protection provided by the government he was serving at a time when such protection seemed most needed.

Had Neagle been a Deputy Sheriff of San Joaquin County assigned by his superior to this very duty of protecting the life of Justice Field, under the State laws, and in the performance of his duties committed the homicide in all other respects under precisely the same circumstances, would he have been arrested by the constable of Lathrop, without a warrant, and disarmed with such inconsiderate haste, and thereby prevented from further performing his duty to protect the life and person of Justice Field, leaving him to pursue the remainder of his journey without protection? Yet the constable was informed that Neagle was acting as a Deputy United States Marshal, under the orders of his superiors, for the protection of the life and person of a Justice of the Supreme Court of the United States.

We do not wish to be regarded as now calmly and deliberately looking back upon the scene, and sitting in judgment upon the action of the constable or as passing censure upon his zeal. He, doubtless, in the emergency, where time for consideration was short, and the facts not fully appreciated, acted according to the best dictates of his judgment necessarily hastily formed. But when the State now comes in after an arrest upon a warrant issued upon such flimsy testimony as that presented, and deliberately claims the exclusive right to sit in judgment upon the acts of the United States Deputy Marshal, performed not upon his own interpretation of the law, but upon that of the Attorney-General of the United States, who may be presumed to possess some knowledge of his powers and duties, it is well to consider the circumstances from a standpoint presenting a view of both sides of the question.

In matters of the public peace, in which the National Government is concerned, the Marshals and Deputy Marshals, within the scope of their authority, *are national peace officers*, with all the statutory and common law powers appertaining to peace officers. Is not the national public peace involved, when a deadly assault is unexpectedly made upon a Judge in open Court, in which the Marshal, and his deputies, seeing the assault, are both authorized and bound on their own motion, without any previous order or command, to interpose, and use sufficient force to quell the disturbance, and subdue the parties making it? Yet where is there any specific provision of the statute imposing that duty upon them? The Marshal is required to attend Court, but it is not provided what he shall do in Court. To what end shall he be in Court if not to keep order, and if necessary, to protect the Judges from violence, by force, or any practicable means? But there is no statute requiring it in terms.

The general duties of marshals are provided for in Section 787, which reads as follows: "It shall be the duty of the marshal of each district to attend the District and Circuit Courts when sitting therein, and execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty." There is no more authority specifically conferred upon the Marshal by this section to protect the Judge from assassination, in open Court, without a specific order or command, than there is to protect him out of Court, when on the way from one Court to another, in the discharge of his official duties. And the assassination in Court, as well as out of it, might well be accomplished before the Judge would be aware of his danger, and before it would be possible to give a command or order to the Marshal for his protection. The authority exists in the one case, as in the other, from the nature of the office, and the powers arising under the common law, recognized and in use in the country, and in the nature of things, inherent in the office. The very idea of a government composed of executive, legislative and judicial departments, necessarily comprehends the power to do all things through its appropriate officers and agents, within the scope of its general governmental purposes and powers requisite to preserve its existence, protect it and its ministers and give it complete efficiency in all its parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect by its all-powerful arm all the other departments and the officers and instrumentalities necessary to their efficiency while engaged in the discharge of their duties.

In language attributed to Mr. ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling judicial authority, but for its intrinsic, sound, common sense: "The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgment of its Courts, are, equally, and at all times, and in all places, sufficient to protect the individual Judge who, fearlessly and conscientiously in the discharge of his duty, pronounces those judgments."

Our jurisprudence is derived from and founded upon that of England, and our Judges and officers are substantially the same. They have corresponding duties imposed upon them, and inherently possess corresponding executive powers, to enable them to effectively perform their duties. From the foundation of our Government, many of their common law duties have been performed, and common law powers exercised without specific or statutory direction, and without question; and the common law principles governing them, except so far as inapplicable, or modified by statute, still remain in force.

The observation of the Supreme Court of California, in the estate of Apple, 66 Cal. 434, in which State a Code has been adopted with respect to the common law not abrogated or modified by the Code, is applicable here. Said the Court: "The code establishes the law of this state respecting the subjects to which it relates; but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the code. When the code speaks, its provisions are controlling, and they are to be liberally construed, with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed hav-

ing been abolished here; but where the code is silent, the common law governs." So here, where the duties of the Marshal are not limited, or specifically defined, by the statute, we must look to the powers and duties of Sheriffs at common law for them so far as those duties come within the purposes and powers of the national Government.

There are many acts and duties daily performed by the Marshals and by other officers that are not specifically pointed out or defined by the statute. The Marshals are in daily attendance upon the Judges, and performing official duties in their chambers. Yet no statute specifically points out those duties or requires their performance. Indeed, no such places as chambers for the Circuit Judges or Circuit Justices are mentioned at all in the statutes. The Judges' chambers do not appear to have any "local habitation." The Justices of the Supreme Court at Washington have, in fact, no chambers otherwise than as they study and do their work out of Court, at a room in their own residences. We have in the San Francisco courthouse rooms that we call chambers, in which the work of the Judges out of Court is in part, but not wholly, performed. I apprehend that the Marshal would as clearly be authorized to protect the Judges here in chambers as in the courtroom. All business done out of Court by the Judge is called chamber business. But it is not necessary to be done in what is usually called chambers. Chamber business may be done, and often is done, on the street, in the Judge's own house, at the hotel where he stops, when absent from home, or it may be done in transitu, on the cars in going from one place to another within the proper jurisdiction to hold court. Mr. Justice Field could, as well, and as authoritatively, issue a temporary injunction, grant a writ of habeas corpus, an order to show cause, or do any other

chamber business for the district in the dining-room at Lathrop, or in the cars, as at his chambers in San Francisco, or in the courtroom. He could have made a writ of habeas corpus returnable before himself on the car, and lawfully heard and decided the case while on his passage to San Francisco. The chambers of the Judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the Judge, and to suitors—places, where the Judge at proper times can be readily found, and the business conveniently transacted. But the chambers of the Judge, as a legal entity, is something of a myth. For the purposes of jurisdiction, the chambers of the Judge are wherever he happens to be in his circuit, or district, when the exigencies of the case call for the transaction of chamber business, and a Judge is as clearly engaged in the discharge of the duties of his office, when going from one place of holding court to another, for the purpose of holding court, and just as much entitled to protection from his own Government against murderous or other assaults, from desperate suitors, on account of his judicial action, as when actually engaged in business at chambers, or in holding court. In England, whence we derive our jurisprudence, the High Sheriff of the shire was the keeper of the King's peace—that is to say, the keeper of the peace of the sovereignty which the King represents. So here, I take it, under the authorities cited, the Marshal is the keeper of the peace of the Government of the sovereignty he serves, within the scope of the supreme powers of that Government. In England, in early days, it was the duty in every shire of the Sheriffs not only to attend the courts, but to attend the Judges through their circuits. They met the Judges at the border of the shire, and attended them until they left it at the border of another. Dalton, on the

Office and Authority of Sheriffs, chapter 98, p. 369, published in 1682. See also 40 Alb. Law Journal, 161. Such is also understood to have been the practice in early days in a number of the States. From the advancing state of civilization this practice has, doubtless, generally become unnecessary for the safety of the Judges, and it has fallen into desuetude. But it does not follow that the power to thus protect them has been abolished or become extinguished. It simply remains latent or dormant, ready to be called into action whenever the exigencies of the case or times require it. And how could there possibly be a more urgent occasion for reviving the practice and calling it into action, than the recent journey of Justice Field to Los Angeles and return on official business?

Upon general, immutable principles, the power must necessarily be inherent in the executive department of any government worthy the name of government, to protect itself in all matters to which its authority extends, and this necessarily involves the power to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. In the National Government of the United States the judiciary constitutes one of its most important branches. Unlike the judiciary of other nations it is invested with the jurisdiction to pass, finally and conclusively, upon the powers of the legislative and executive departments of the Government, and to confine them within their constitutional limits. It is, therefore, the balance wheel of the National Government, that keeps it running regularly and smoothly within its proper domain. Impotent, indeed, must be the executive branch of the government, if it is not empowered to protect the lives of the Judges of the highest branch of its judiciary, from assault and assassination, on account of their judicial decisions, by desperate disappointed

litigants, while passing from point to point within their territorial jurisdiction in the discharge of their high functions and duties. We cannot think the power can be wanting, even if there were no constitutional or statutory provision governing the case. It seems impossible that the National Government should be left to the mercy, good will, or complacency of the State, to afford that protection to its Judges that the United States, if worthy to be called a nation, are bound themselves to furnish.

As a further example of laws, not ordained by specific statutory enactments, see those respecting punishment for contempts. For forty years after the organization of the National Government, down to 1831, there was no Statute which specifically defined contempts of court. *Ex parte* Robinson, 19 Wal., 510; *ex parte* Terry, 128 U. S., 302-3; *ex parte* Savin, 131 U. S., 275. But the courts, nevertheless, exercised the power, necessarily, from the nature of things inherent in every court, to protect itself, its dignity and its officers, by the punishment of many acts as contempts of its authority. The first specific Act upon the subject passed by Congress was not an Act enlarging the power of the court, but it was, on the contrary, a restriction of the powers already exercised within certain defined limits. The act was passed at the instance of Senator Buchannan, to limit the power of the court theretofore exercised, to punish for contempts, as a sequel to the impeachment of a United States Judge for the District of Missouri. The Act was passed March 2, 1831, and is entitled, "An Act declaratory of the law concerning contempts of Court." 4 U. S. Stat. at Large, 487. The first section does not *grant* the power to punish for contempts, but expressly recognizes the existing power, and, in express terms thereafter, limits the

power to certain enumerated cases. In order that those who were before subject to punishment for contempt should not escape the penalties due their acts, section 2 of the statute makes certain acts, before punishable as contempts, offenses against the laws of the United States, punishable by the less summary and more deliberate proceeding on indictment and trial by a jury. Many of the acts under that Act, recognized as punishable as contempts, as being necessary to the prompt and summary vindication of the authority of the court, are also indictable offenses under other statutes.

This Statute of 1831 has been carried into the Revised Statutes, Section 1 of that Act having been reenacted in Section 725 of the Revised Statutes, giving it a granting, as well as a restricting, form, but in no sense changing its purpose or meaning. And Section 2 is now found in Section 5399 of the Revised Statutes, as a part of the criminal code of the nation.

Did anybody ever doubt, or does anybody now doubt, that the power of the United States Courts to punish contempts, from the organization of the government down to 1831, was just as ample, and that it was just as much a part of the law of the United States, inherently, vested in the courts, as it was after the passage of the Act of 1831, or as it is now under the same provisions carried into the Revised Statutes?

Yet, there was no specific provision of the statutes defining contempts. It was a power, however necessarily, inherent in the courts. It is involved in the very idea of a court, having power to administer the laws of the land. It would be impossible for courts to perform their functions and administer the laws without it. And as so inherent, the power to punish various acts not mentioned for contempt was as much a part of the law of

the United States as if ordained by a specific provision of the Statute of the United States, and the authority of the Marshal to protect the Judges is a cognate power, also, necessarily, inherent in the office he holds. Thus there is much law of the United States not now found in terms in the statutes, but as valid and binding upon the people and upon the States as if it were specifically and definitely therein expressed. See *U. S.* vs. *Hudson*, 7 Cr., 32–4. Matter of Meador, 1 Abb., 324. *In re* Buckley, 69 Cal., 18.

But we are not without constitutional and statutory provisions, broad enough and specific enough, as we think, to cover the case. The National Constitution, providing a government for sixty-five millions of people, covers but a very few pages, but it seems to be amply sufficient for the purposes intended. In prescribing the duties of the President, in the terse but comprehensive language of section 3, article II, it provides that "he shall take care that the laws be faithfully executed." This makes him the executive head of the nation, and gives him all the authority necessary to accomplish the purposes intended—all the authority necessarily inherent in the office, not otherwise limited. Congress, in pursuance of powers vested in it, has provided for seven departments, as subordinate to the President, to aid him in performing the executive functions conferred upon him. Section 346, R. S., provides that, "one of the executive departments shall be known as the Department of Justice," and that there shall be "an Attorney-General, who shall be the head thereof." He has general supervision of the executive branch of the National Judiciary, and section 362 provides as a portion of his powers and duties, that "the Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the

districts of the United States and Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct." Section 788, R. S., provides that "The marshals and their deputies shall have, in each State, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." By section 817 of the Penal Code of this State, the Sheriff is a "peace officer." By section 4176, Pol. Code, he is "to preserve the peace" and "prevent and suppress breaches of the peace." The Marshal is, therefore, in accordance with the decision of the Supreme Court already referred to, and under the provisions of the statute above cited, "a peace officer," so far as keeping the peace in any matter wherein the national powers of the United States are concerned, and as to such matters he has all the powers of the sheriff, as a peace officer under the laws of the State. He is, in such matters, "to preserve the peace" and "prevent and suppress breaches of the peace." An assault upon or an assassination of a judge of a United States Court while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions, or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the Marshal or his deputies to prevent as a peace officer of the national government. Such an assault is not merely an assault upon the person of the judge, as a man. It is an assault upon the national judiciary, which he represents, and through

it an assault upon the authority of the nation itself. It is, necessarily, a breach of the national peace. As a national peace officer, under the conditions indicated, it is the duty of the Marshal and his deputies to prevent a breach of the national peace by an assault upon the authority of the United States, in the person of a judge of its highest court, while in the discharge of his duty. If this be not so, in the language of the Supreme Court before cited, "Why do we have Marshals at all?" What useful functions can they perform in the economy of the national government?

The Constitution of the United States provides for a Supreme Court, with jurisdiction more extensive in some particulars than that conferred on any other national judicial tribunal. If the Executive Department of the government cannot protect one of these Judges while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the Court may be killed, and the Court itself exterminated, and the laws of the nation by reason thereof, remain unadministered and unexecuted. The power and duty imposed on the President to "take care that the laws are faithfully executed," necessarily carries with it all power and authority necessary to accomplish the object sought to be attained, and, certainly, the power and duty to protect from the deadly assaults of desperate suitors, the lives of the Judges of the highest Court in the nation, while engaged in the lawful discharge of their duties.

As we have before seen, neither Constitution nor statutes can, or do, anticipate and point out, specifically, every possible right or duty to be covered and secured. They must, necessarily, be general. In the

passage already cited from *Tennessee* vs. *Davis*, the Supreme Court, in speaking of certain officers, says: "It has never been doubted, that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security." (100 U S., 265). And in *United States* vs. *Macdaniel*, 7 Pet., 14, similar views were expressed. Said the Court: "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he *must* show a statutory provision for every thing he does. *No government could be administered on such principles.* * * * *There are numberless things which must be done, that can neither be anti ipated nor defined, and which are essential to the proper action of the government.*" These observations are especially, and forcibly applicable to the terse but very comprehensive provisions of the Constitution and of the several statutes cited, as to the powers and duties of the President, the Attorney-General and Marshals.

The act of the Attorney General in directing the United States Marshal to protect the life of Mr. Justice Field against the assaults of the deceased and his wife, is in legal contemplation the act of the President. The President speaks and acts through the heads of the several executive departments in relation to subjects which appertain to their respective duties. They are but the subordinates of the President, wielding his

power. (*Wilcox* vs. *Jackson*, 13 Pet., 513; *United States* vs. *Cutter*, 2 Curtis, 617). In the former case, relating to a reservation of land by the Secretary of War, the court said, "Now although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." See also 7 Attorney General's Opinions, 480-1, id. 433-479. Confiscation cases, 20 Wal., 108-9, *United States* vs. *Eliason*, 16 Pet., 291.

By Section 788 R. S., and the several provisions of the Statutes of California herein cited, the United States Marshal is made a peace officer and as such he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States and obstructs the operations of the government and its various departments. The courts must, from the nature of things, be enabled fully to perform all their functions imposed upon them by the Constitution and laws without hindrance or obstruction, and they must have the inherent power to protect themselves by, and through their executive officers, under the direction and supervision of the Attorney-General and the President, against obstruction and hindrance in the performance of their judicial duties. An assault upon a Judge in Court, or a Judge out of Court, while in the performance of his duty, induced by his judicial action, and intended or calculated to obstruct him in, or deter him from, a free and full discharge of his duty, is a breach of the national peace affecting the sovereignty of the nation, and tending to obstruct *and impair* the operations and efficiency of one of the most important departments of the government. As such, it is the

duty of the United States Marshal, under the police powers of the nation so conferred upon him, by the statutes cited, and as a national peace officer, to prevent such breach of the peace. Under the State laws deputy sheriffs, when occasion requires, constables and police officers of cities are assigned to certain districts to watch over the safety of the citizens and to guard and protect their persons and property from assault, destruction or injury, *in short to prevent the commission of crimes*, etc. These officers in cities are found everywhere, night and day, guarding the citizen and his property from injury. So the Attorney-General, under the provisions of the statute cited, and the President under the provisions of the Constitution, requiring him to see that the laws are faithfully executed, are authorized and empowered to direct the assignment by the marshal, of any deputy to perform any special national police duty within his jurisdiction, arising out of the statutes, whether by express provision or necessary implication, and under any power, necessarily inherent in the President and government, in order to give full effect and efficiency to the government, or any of its departments. It has never, so far as we are advised, been doubted that a Marshal or Deputy Marshal is authorized to protect a Judge, and preserve order in open court, even by the use of force, without any special order or command, as a part of the duties necessarily inherent in his office; yet, as we have already seen, there is no more specific statutory authority for so preserving order, and protecting the Judge in court, than for performing the same duty, under proper conditions, for a Judge engaged in performing his duties, of whatever nature out of court.

It is argued by one of the counsel on behalf of the State that these matters pertain exclusively to the peace of the State, and that the State has not only

power to preserve the public peace, but that it is amply capable of performing this service, that it is its duty to do it; that the threats of the deceased were matters of public notoriety; and that by calling the powers of the State into action, Justice Field's life might have been protected by the State, and there would have been no necessity whatever for what is called on the part of the State, the illegal action of the United States Marshal. It may be conceded, and it is undoubtedly true, that it was an imperative duty of the State to preserve the public peace, and to amply protect the life of Mr. Justice Field, *but it did not do it.* Where would Mr. Justice Field have been to-day, had he relied solely upon the State to perform her conceded imperative duty?

Not having performed that obligation while on his journey in discharge of his judicial duties, does a complaint now come with a good grace from the State against the United States for performing it for her, as well as for the National Government, by protecting one of their most distinguished judicial functionaries through one of their own officers; in the only manner in which it could have been effectively performed?

In the present case, and on this official journey, there was a necessity for the kind of protection afforded Mr. Justice Field, for no other kind would have been adequate. The occasion required a preventive remedy.

The use of the State police force would have been impracticable, as the powers of the Sheriff would have ended at the borders of his county, and of other township and city peace officers, at the boundaries of their respective townships and cities. Only a United States Marshal, or his deputy, could exercise these official functions throughout the United States judicial district, and as we have seen, the powers exercised concern

matters affecting the peace of the National Government, and if the National Government has no authority to act in the premises it certainly ought to have such power.

The only remedy suggested on the part of the State was to arrest the deceased and hold him to bail to keep the peace under Section 706 of the Penal Code, the highest limit of the amount of bail being $5000. But although the threats are conceded to have been publicly known in the State, no State officer took any means to provide this flimsy safeguard.

Perhaps counsel intended to intimate that it was not the duty of the State, but of Mr. Justice Field himself to set in motion proceedings under the law furnished by the State, to put the decedent under bonds to keep the peace. Has it come to this, then, that a Justice of the Supreme Court of the United States, when in obedience to the behests of the law, he comes to Califoruia to perform his judicial duties, must submit to the humiliation of immediately upon his arrival, stealing away to some justice of the peace and instituting proceedings to bind over to keep the peace vindictive and dangerous litigants who have threatened his life? But what security to Mr. Justice Field would a bond of $5000 afford against resolute, violent and desperate parties, for whom the penalties for murder have no deterring power? The United States Marshal, the United States Attorney for the District of California, the Attorney-General of the United States at Washington, and the mass of the people of California thought that the exigencies of the occasion required something more, and the result fully justified their view of the matter.

Although no adequate means of protection were afforded by the State on his late official journey, and Mr. Justice Field would, in all probability, not now

be among the living had not the petitioner, by the wise forethought of the Attorney-General, been detailed to protect his life, yet the fact of the failure of the State to perform its duty, does not afford any reason for taking the petitioner out of the custody of the State, unless, in committing the homicide, he was engaged in the performance of "an act done * * * in pursuance of a law of the United States," and the killing was justifiable. The failure to perform its duty would not, alone, oust the jurisdiction of the State, if it be exclusive. But since the possible remedy mentioned under the State law was alluded to by counsel as ample, we refer to it as illustrating the necessity for a speedy amendment of the laws of the United States, if they are now so defective as to afford no protection to the United States Judges in the performance of their high functions.

It is apparent to us, if he is not now so protected, that the distinguished Justice allotted to the Ninth Circuit, and also his associates, should have thrown over them the protecting ægis of the laws of that government which he has so long, faithfully and efficiently served.

After mature consideration, we have reached the conclusion that the homicide in question was committed by petitioner while acting in the discharge of a duty imposed upon him by the Constitution and laws of the United States, within the meaning of the provisions of Section 753 of the Revised Statutes.

It only remains to inquire, secondly, was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

The answer to this proposition is really included in the answer to the last, but we desire to make some observations bearing especially upon it.

The Attorney-General and counsel for the State declined to discuss the question as to whether the homicide was justifiable, because, in their view, this is a question solely for the State Court, the case, as claimed by them, not being within the provisions of section 753 of the Revised Statutes, and, therefore, not within the jurisdiction of this Court. Holding, as we do, that the case falls within those provisions, so far as the petitioner was authorized to act, by the Constitution and laws of the United States, it becomes necessary to determine whether the homicide was justifiable. For, if it was malicious, wanton or reckless, without any reasonable apparent necessity in order to fully and properly perform his duty of protecting Justice Field, then it was an act performed beyond and outside his duty, and he is amenable to the State Courts.

The facts set forth in the petition, and in the traverse to the return of the Sheriff, are fully and satisfactorily proved by the testimony, and whether we determine the case upon demurrer to the traverse, or upon the whole case, as presented in the record and evidence, the result must be the same.

Were the question of justification to be determined by the laws of the State of California, or in the State Court, there could be no ground for doubt. Says the Penal Code: "Homicide is also *justifiable* when committed by any person when resisting any attempt to murder any person, * * * *or to do some great bodily injury upon any person.*" (Sec. 197, Penal Code.) But we shall consider the question without reference to the statute of California.

It is unnecessary to repeat the facts in full. When the *deceased* left his seat, some thirty feet distant, walked stealthily down the passage in the rear of Justice Field and dealt the unsuspecting jurist two preliminary blows, doubtless by way of reminding him that *the time for vengeance* had at last come, Justice Field was already at the traditional "wall" of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When, in a dazed condition, he awoke to the reality of the situation and saw the stalwart form of the deceased with arm drawn back for a final mortal blow, there was no time to get under or over the table, had the law, under any circumstances, required such an act for his justification. Neagle could not seek a "wall" to justify his acts without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, "Stop! I am an officer," and saw the powerful arm of the deceased drawn back for the final deadly stroke instantly change its direction to his left breast, apparently seeking his favorite weapon, the knife; and at the same time heard the half-suppressed disappointed growl of recognition of the man who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife at the courtroom a year before, the supreme moment had come, or, at least, with abundant reason, he thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal consensus of public opinion of the United States seems to justify the act. On that occasion, a second, or two seconds, signified, at least, two valuable lives, and a reasonable degree of prudence would justify a shot one or two seconds too soon, rather than a fraction of a second too late. Upon

our minds the evidence leaves no doubt whatever that the homicide was fully justified by the circumstances.

We have seen in an eastern law journal, but with its disapproval, some adverse criticism upon the action of the petitioner, attributed to a quarter ordinarily entitled to great consideration and respect. But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3000 miles away, looking backward over the scene, to determine the exact point of time when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, in all probability, the proper time would never come. Neagle on the scene of action, facing the party making a murderous assault, knowing by personal experience his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms, his readiness to use them, and his angry, murderous threats, and seeing his demoniac looks, his stealthy assault upon Justice Field from behind, and, remembering the sacred trust committed to his charge—Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come, and if he, honestly, acted with reasonable judgment and discretion, the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case, and say that he fired the smallest fraction of a second too soon?

In our judgment he acted, under the trying circumstances surrounding him, in good faith and with consummate courage, judgment and discretion. The